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Products Liability, Workmen's Compensation and the Industrial Accident

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I. Historical Development: The Injured Workman and Compensation Mechanisms

The late nineteenth and early twentieth centuries witnessed an industrial revolution that was to reshape the very structure of society itself. With the advent of industrialization came the evolution of a system of tort liability whereby those who had suffered injury due to the unreasonable acts of another could recover suitable compensation.[1] One primary focus of this tort system, concerned as it was with the allocation of losses resulting from socially unreasonable conduct, was the definition of the liability of an employer to a workman injured in the course of his employment.

A. *The Common Law System of Compensation*

An employer at common law was held to several narrowly defined duties of care for the protection of his workers.[2] An employer had to use reasonable care in providing both a safe place to work and adequate tools and appliances.[3] He had a duty to warn his servants

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1. Somewhere around the year 1825, negligence began to emerge out of the action on the case, and to be recognized as a separate basis of tort liability, independent of other causes of action. Its use coincided to a remarkable degree with the industrial revolution in England.

> It was probably stimulated a great deal by the enormous increase of industrial machinery in general and by the invention of railways in particular. At that time, railways were notable neither for speed nor safety. They killed any object from a Minister of State to a cow, and this naturally reacted upon the law.

W. Prosser, Cases and Materials on Torts 163 (4th ed. 1967), *citing* P. Winfield, Law of Tort 404 (5th ed. 1950).

2. *See* cases collected in W. Prosser, Handbook of the Law of Torts § 80 nn.91-95, at 526-27 (4th ed. 1967) [hereinafter cited as Prosser].

3. *Id.* nn.91-92, at 526.

of those dangers with which they might conceivably be unacquainted and to promulgate and enforce rules in furtherance of employee safety.[4] An employer also had an obligation to provide a suitable number of fellow servants,[5] although he was not held liable for the negligent conduct of an employee's fellow workers.[6]

As an uncontrovertible incident of the employment contract, an employee was held to have relieved his employer of liability for most work-related hazards not covered by the employer's common law duties. Despite the lack of any conscious, voluntary choice on the part of an employee to subject himself to an occupational hazard, he had no right to collect for an injury arising from dangers normally incident to his employment. An employee, by his decision to remain employed despite knowledge of industrial hazards, implicitly relieved his employer of the common law obligations to safeguard against such hazards.[7]

Even when an employee's injury was clearly related to dereliction of his employer's common law duty, there was no guarantee of compensation. The employee might find his recovery barred by the doctrine of contributory negligence,[8] whereby his own negligence, however slight, destroyed his right to recover compensation from the more-negligent employer. Or, the employee's cause of action for his employer's violation of a duty could be defeated by the employer's defense of "voluntary assumption of the risk."[9] Under this doctrine, an employee was held to have "consented" to any negligence on the

4. *Id.* nn.93, 95, at 526.

5. *Id.* n. 94, at 526.

6. The "fellow-servant rule" placed the burden of taking precautions against the negligence of co-workers squarely on the employee. The employer was held to no duty to protect his servants against the unreasonable acts of one another, since the servants were thought to be in a much better position to protect themselves. C. LABATT, MASTER AND SERVANT 473 (1904). The prospect of liability to a fellow servant was intended to make each servant more careful of the other's safety.

7. This relieving of liability could be by formal contract such as that in Conway v. Furst, 57 N.J.L. 645, 32 A. 380 (N.J. App. 1895). More often it rested upon implied consent. *See* Note, 47 VA. L. REV. 1444 (1961).

8. Contributory negligence bars plaintiff's recovery on the theory that defendant's negligent act was not the proximate cause of the injury. Contributory negligence disentitles a worker to sue, and the law will not investigate further to determine the employer's relative fault. *See* Bohlen, *Contributory Negligence*, 21 HARV. L. REV. 233 (1908); Warren, *Volenti Non Fit Injuria in Actions of Negligence*, 8 HARV. L. REV. 457, 459 (1895).

9. *See, e.g.*, Priestley v. Fowler, 150 Eng. Rep. 1030 (Ex. 1837), a classic master-servant confrontation case where voluntary assumption of the risk decided the liability issue in favor of the employer.

part of his employer—even that arising from breach of common law duties—by choosing to remain employed.[10]

The hardship upon the workman was readily apparent. Even in cases where he had not been contributorily negligent, an employee had to overcome the presumption that he had impliedly consented to the injury by demonstrating that the employer had behaved willfully or wantonly[11] or had created false illusions of safety[12] upon which the employee had relied. The three wicked sisters of the common law—the fellow-servant rule, contributory negligence, and voluntary assumption of the risk—effectively operated to shift the ultimate burden of a work-related injury from the employer to the party least able to bear the loss—the injured workman.

B. *The Legislative Effort: A System of Compensation for the Workman*

The proliferation of uncompensated occupational injuries mandated nothing short of a comprehensive solution.[13] The reallocation of the burden of employee injury from the employee to the enterprise required a system of loss distribution whereby the economic burdens of such injury would be treated as a fixed cost of doing

10. *See, e.g.*, Brown v. Lennane, 155 Mich. 686, 118 N.W. 581 (1908); Manks v. Moore, 108 Minn. 284, 122 N.W. 5 (1909); Clarke v. Holmes, 158 Eng. Rep. 751 (Ex. 1862). *See also* Cudahy Packing Co. v. Parramore, 263 U.S. 418, 423 (1923); 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION §§ 1-2.20, at 1-7 (1952) [hereinafter cited as LARSON, WORKMEN'S COMPENSATION]; Larson, *The Legal Aspects of Causation in Workmen's Compensation*, 8 RUT. L. REV. 423 (1954) [hereinafter cited as Larson, *Legal Aspects*]; Comment, *Workmen's Compensation and Employer Suability: The Dual Capacity Doctrine*, 5 ST. MARY'S L. REV. 818, 819 (1974) [hereinafter cited as Comment, *Dual Capacity*].

11. Willful intent to injure was not one of the risks to which an employee was deemed to have given his implied consent. When the workmen's compensation statutes were formulated. several provided for the resurrection of an employee's right to a suit at common law for an employer's willful misconduct. The misconduct had to be outrageous before the extraneous right was thought to exist, however. *See, e.g.*, Fowler v. Southern Wire & Iron, Inc., 104 Ga. App. 401, 122 S.E.2d 157 (1961), *rev'd*, 217 Ga. 727, 124 S.E.2d 738 (1962), where the plaintiff-employee alleged the right to a suit at common law for the employer's willful misconduct in directing him to work in an acid vat with his bare hands as a punishment for refusing to divulge the names of union organizers. The misconduct was not deemed severe enough to overcome the statutory provision of exclusive remedy.

12. *See* cases collected in PROSSER, *supra* note 2, § 80, nn.14, 15 at 528.

13. Several states studied the problem; the estimated percentages of uncompensated industrial injuries were shockingly high. The New York Employer's Liability Commission's First Report in 1910 estimated the figure to be 87 percent. 1 FIRST REPORT OF THE NEW YORK EMPLOYER'S LIABILITY COMMISSION 25 (1910). Ohio's commission reported 94 percent. REPORT OF THE OHIO EMPLOYER'S LIABILITY COMMISSION XXXV (1911).

business and assimilated into the general costs of production.[14] "The cost of the product must bear the blood of the workman."[15] At the same time, the distribution mechanism would have to strike a just balance between the workman, who had a right to some fair compensation for tortious conduct, and the employer, who had a right to pay only his fair share of work-related losses.[16]

The solution settled upon was "workmen's compensation"—a system of no-fault compensation whereby the employer would take out insurance coverage which would pay limited amounts to a worker who had sustained a "work-related" injury. No proof of employer negligence would be required; the payment of compensation would be determined by an evaluation of the employee's status at the time of his injury rather than an evaluation of the employer's fault. The existence of an employer-employee relationship, in the course of which a work-related injury was sustained, thus became the threshold determinant for payment of a workmen's compensation award.[17]

For the employee, the enactment of workmen's compensation statutes by the states[18] was a welcome improvement over the private-law system which required an employee to affirmatively prove negligence on the part of his employer in order to recover. The long delays inherent in the private lawsuit as the mechanism for employee compensation were all but eliminated by the insurance-claim provisions of the new statutes. These statutes also eliminated the three defenses—the fellow-servant rule, contributory negligence, and voluntary assumption of the risk—which had so effectively

14. *See* Lehigh Valley Coal Co. v. Yensavage, 218 F. 547 (2d Cir. 1914), *cert. denied*, 235 U.S. 705 (1915). *See also* Bohlen, *A Problem in the Drafting of Workmen's Compensation Acts*, 25 HARV. L. REV. 328 (1912) [hereinafter cited as Bohlen]; Walton, *Workmen's Compensation and the Theory of Professional Risk*, 11 COLUM. L. REV. 36 (1911) [hereinafter cited as Walton].

15. Prosser attributes his poetic description to Lloyd George. *See* PROSSER, *supra* note 2, § 80 n.37, at 530.

16. *See generally* Bohlen, *supra* note 14; Larson, *The Nature and Origins of Workmen's Compensation*, 37 CORNELL L.Q. 206 (1952) [hereinafter cited as Larson, *Nature and Origins*]; Riesenfeld, *Contemporary Trends in Compensation for Industrial Accidents Here and Abroad*, 42 CALIF. L. REV. 531 (1954) [hereinafter cited as Riesenfeld]; Walton, *supra* note 14.

17. *See generally* A. LARSON, THE LAW OF WORKMEN'S COMPENSATION 1-7, *passim* (3d ed. 1970); I. SCHNEIDER, WORKMEN'S COMPENSATION 6 (2d ed. 1932).

18. *See generally* Bohlen, *supra* note 14; Larson, *Nature and Origins*, *supra* note 16; Riesenfeld, *supra* note 16; Walton, *supra* note 14.

barred an employee's recovery under negligence theories, since degree of fault was no longer at issue.[19]

In return for the speedy adjudication of claims and diminished proof of eligibility under the workmen's compensation statutes, the employee was forced to waive his common law right to sue the employer in tort for work-related injuries. A provision that workmen's compensation was to be the "exclusive remedy"[20] for work-related injuries was incorporated in all of the state statutes.[21] Additionally, a ceiling was placed on the amount recoverable by the injured employee by fixing the maximum recovery as a percentage of the average wage statewide, the percentage to be based on the degree of disability—an amount usually considerably less than a jury would have awarded as damages.[22] The employee thus traded the possibility of a generous award after litigation for the assured recovery of a smaller amount under a workmen's compensation statute. The employer accepted the financial burden of a broadened statutory liability without proof of fault in exchange for a release from all common law tort obligations of due care.[23]

The workmen's compensation statutes in theory provide several

19. This result is logical in a system based on the employee's *status* rather than employer *fault*. However, cases collected in PROSSER, *supra* note 2, § 80 at 533 n.64 question the logic of this result.

20. The exclusive remedy provision of workmen's compensation statutes is generally phrased as follows: "Nor shall any other action be brought against the employer . . . by an employee . . . or . . . by anyone otherwise entitled to recover damages . . . on account of such injury or death . . . ." *See, e.g.*, N.Y. WORKMEN'S COMP. LAW § 11 (McKinney 1965).

21. All state statutes provide for the exclusivity of the workmen's compensation remedy. *See generally* 2 LARSON, WORKMEN'S COMPENSATION, *supra* note 10, § 65.10 at 135. As to the Pennsylvania workmen's compensation statute see PA. STAT. ANN. tit. 77, §§ 1-1603 (1952). *See also* Hartwell v. Allied Chem. Corp., 457 F.2d 1335 (3d Cir. 1972); Watkins v. National Elec. Prod. Corp., 69 F. Supp. 596 (W.D. Pa.), *aff'd*, 165 F.2d 980 (3d Cir. 1947).

22. This was thought to be a fair compromise for the employee's right to compensation without proof of fault. All states adopted some form of schedules defining compensation rights. *See, e.g.*, PA. STAT. ANN. tit. 77, § 306 (1952). The Pennsylvania statute, since 1972, has provided $60 per week for total disability and $45 per week for permanent partial disability. *See also* Johnson, *Can Our State Workmen's Compensation System Survive?*, 3 FORUM 265, 269 (1968) [hereinafter cited as Johnson].

23. The majority of state's workmen's compensation acts were mandatory for certain types of employment. An employer's affirmative disavowal of coverage under the act restored to the employee the right to a lawsuit against the employer for breach of any common law duty. *See, e.g.*, Liberato v. Roger & Herr, 28 Pa. Dist. 268, 22 Dauph. 1 (C.P. 1919); Kaplan v. Haney, Kuttner & Raab, 27 Pa. Dist. 535 (C.P. Phila. Co. 1918). This penalty for non-election was widely accepted as a mechanism for encouraging employer participation.

practical advantages over the common-law system of recovery. The claim-recovery process, similar to that of private insurance contracts, avoids the cost and delay characteristic of the private lawsuit recovery mechanism. The funding for the loss-distribution mechanism, accomplished by employers' periodic payments of premiums into a common fund from which compensation is paid, allows the cost of employee injuries to be figured into the ultimate cost of the product. The elimination of the possibility of a tort suit against an employer diminishes the friction which would normally occur between the adversary parties involved in a traditional lawsuit. Since the amount of the premium paid by the employer is related to the dollar value of the claims paid to his employees, the employer has, at least theoretically, a strong interest in providing a safe working environment. Moreover, the exclusiveness of the remedy against the employer generally does not preclude an employee's cause of action against a third party who in some way legally contributes to the employee's injury.

C. *Adequacy of the System: A Criticism*

The loss distribution mechanism established under workmen's compensation in practice has been accused of falling far short of its theoretical goals.[24] The limited-recovery compensation schedules, even as recently amended, deliberately do not include amounts that would be payable under tort law for pain and suffering or for impairment of earning capacity.[25] The schedules provide compensation for lost earnings at a fixed maximum rate tied to the average weekly wage, with no variation allowed even when a worker's weekly wage substantially exceeds the scheduled amounts.[26] In the case of de-

24. *See, e.g.*, Johnson, *supra* note 22.

25. These elements, normally recoverable for a loss occasioned by another's tortious conduct, were excluded in order to keep the compensation schedules within reasonable limits.

26. The benefits under workmen's compensation have been increased over time to reflect changing economic conditions. *E.g.*, Act of June 2, 1915, No. 338, [1915] Laws of Pa. 736, provided a maximum of $15 per week for total disability; Act of June 4, 1937, No. 323, [1937] Laws of Pa. 1552, increased this to $18 per week; Act of May 14, 1949, No. 409, [1949] Laws of Pa. 1369, increased this to $25 per week; Act of Jan. 2, 1952, No. 481, [1952] Laws of Pa. 1803, increased this to $30 per week; Act of March 29, 1972, No. 61, [1972] Laws of Pa. 159, raised the limit to $60 per week. The Report of the National Commission on State Workmen's Compensation Laws concluded that the state compensation laws were neither adequate nor equitable. *See* THE REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS 126 (1972).

bilitating injury, the amount recoverable under workmen's compensation is at best a meager fraction of the amount required to "make the injured party whole again."

One may readily see, upon reviewing the merits of the philosophy that motivated the introduction of workmen's compensation, that the remedy therein provided could not be and was never intended to be a total restitution for damages. The partial restitution afforded by statute seems generous when afforded to the employee whose employer is not in any way legally at fault in precipitating a work-related injury. In these situations, a loss uncompensable under tort law nevertheless is partially paid for by the employer's insurance fund, and part of the burden on the employee is distributed to the enterprise. But in cases where the employer has actively contributed to or caused the employee's harm by negligent conduct, the partial compensation offered under statute as the employee's exclusive remedy is inequitable, in addition to being less than adequate.

Much has been written in an attempt to balance the right of an injured employee to fair compensation against an employer's right to limit his exposure under an expanded system of absolute liability. A return to a pure fault system where employer's and employee's conduct would be tested for fault, and loss distribution made accordingly, would reopen the Pandora's box of problems which was closed by the original workmen's compensation statutes. It seems fair to ask the employee to absorb some loss by agreeing to partial compensation where his injury is the unavoidable consequence of lawful enterprise.[27] But when the employer's behavior toward his employee is so reprehensible as to be characterizable as "moral negligence," all notions of justice ask that the burden of the injury fall more heavily on the employer than on his innocent employee.

In an attempt to balance the scales of justice, penalty statutes[28]

27. It has been suggested that it might be advisable to characterize certain types of negligent acts as "moral negligence" so as to be able to censure truly reprehensible conduct. "When liability was affixed" as a result of some unavoidable consequence of lawful enterprise, the negligence was properly characterizable as "negligence without fault." A. EHRENZWEIG, TRENDS TOWARD AN ENTERPRISE LIABILITY FOR INSURABLE LOSS: NEGLIGENCE WITHOUT FAULT 16, 61 (1951).

28. Few workmen's compensation statutes created any exception to the exclusive-remedy provision of the statute by allowing additional suits against the employer. The employer could be sued for willful conduct, such as assault. *See* Readinger v. Gottschall, 201 Pa. Super. 134, 191 A.2d 694 (1963). But willful conduct such as violation of a safety statute did not constitute the sort of non-accidental injury for which a cause of action would lie. Evans v. Allentown

were enacted to provide sanctions against an employer whose negligence was substantially greater than that which his employee could reasonably be asked to tolerate.[29] Some of these statutes allow an employee, whose injury would ordinarily be exclusively covered by workmen's compensation, to elect whether to collect workmen's compensation or to sue the employer at common law for wanton and willful misconduct or intentional injury, which would have the potential for providing a recovery for the entire loss the injured employee has suffered, rather than merely compensating for lost wages as workmen's compensation would. Other penalty clauses provide for a substantial percentage increase in workmen's compensation benefits where an employer indulges in serious and willful misconduct or violates a safety statute. Either of these two legislative modifications tempers the harshness of the hitherto uncompensated losses borne by an employee who suffers injury in the employ of a grossly negligent employer. But even a 100 per cent increase over the inadequate lost-earnings workmen's compensation restitution may not make the seriously injured employee whole again.[30]

Portland Cement Co., 433 Pa. 595, 252 A.2d 646 (1969). Even if the employer's conduct amounted to aggravated negligence and included such elements as knowingly permitting hazardous work conditions or willfully ordering dangerous practices, no cause of action existed. *See* cases collected in 2A LARSON, WORKMEN'S COMPENSATION, *supra* note 10, §§ 68.10-.23 *passim*.

29. Larson notes that a limited recognition of fault through the penalty clause may be some solution to the inequity. The penalty gives an incentive to employers to observe safety rules without thwarting the social risk distribution concepts by denying all recovery to the employee or relieving the employer of nothing. 2A LARSON, WORKMEN'S COMPENSATION, *supra* note 10, § 70.20 *passim*.

30. The majority of safety statutes fail to provide for any penalty, either by the employee or by the state, against the employer who willfully refuses to obey the statute, even if his conduct results in serious injury to persons in the class for whose protection the statute was intended. *See* Evans v. Allentown Portland Cement Co., 433 Pa. 595, 252 A.2d 646 (1969). The deterrent impact of such a statute cannot help but be minimal.

The Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-78 (1970), provides for the assessment of fines against employers who violate certain safety provisions. For example, under *id.* §§ 651, 652(a)(2), the employer's failure to provide a safety guard on a machine subjects him to a penalty of $50. Gould-Mersereau Co., [1974-75] O.S.H.D. ¶ 19,474 (1975) (Burroughs, Judge).

As an alternative to a statutorily-determined fine, seven states provide for a percent increase in the benefits payable under workmen's compensation if the employer has violated a state safety statute. *See* MO. ANN. STAT. § 287.120 (1965); N.M. STAT. ANN. § 342.105 (1962); N.C. GEN. STAT. § 97-12 (Supp. 1975); OHIO CONST. art. II, § 35; S.C. CODE § 72-157 (1962); UTAH CODE ANN. § 35-1-12 (1974); WIS. STAT. ANN. § 102.57 (1973). The percentage-increase ranges from 10% (New Mexico, North Carolina, South Carolina) to 15% (Missouri, Utah, Wisconsin), with a discretionary allowance of up to 50% in Ohio. IOWA CODE ANN. §§ 85.16-

A limited number of states permit suits against an employer by an employee under the theory that an employer has an independent obligation to his employee, for breach of which a common-law action lies. Thus, an employee may sue his employer in a suit extraneous to the workmen's compensation remedy if the employer has a "dual-capacity" with respect to the employee.[31] The crux of the issue is not so much "capacity" as "duality" of obligation to plaintiff. For example, if a doctor negligently treats a patient who happens to also be his employee, the employer is acting in an additional "capacity" as physician. The employee has a separate cause of action in tort based on the obligation of professional competence imposed upon the employer in his capacity as physician. This separate action against the employer has been likened to a "third party action," in recognition of the fact that an employee retains all rights to sue third party tortfeasors irrespective of the existence of his workmen's compensation remedy against his employer.

It is easy to justify the dual-capacity doctrine when the obligation of the employer as "third party" is readily distinguishable from the obligation of which he is relieved under workmen's compensation. For example, consider the case of an employer, owner of a laundromat and a drugstore, whose drugstore clerk is injured on the laundromat property while in the course of employment for the drugstore.[32] The obligation of the employer to his employee—to provide safe working conditions in the drugstore for his clerk—is readily separable from the obligation of a landowner to keep his premises reasonably safe for the protection of business invitees. The allowance of a common-law suit against the employer for negligent maintenance of business premises is not inconsistent with the exclusive-remedy provisions of workmen's compensation. The action against the employer in his dual capacity is founded upon a duty of care external to the employer-employee relationship. Just as an em-

88.14 (1966) provides that if the employer has violated a safety statute, the employee's workmen's compensation recovery, normally subject to a percent reduction for contributory negligence on his part, cannot be reduced at all. The employee's violation of any one of a number of regulations will bar or diminish his recovery under most workmen's compensation statutes. *See, e.g.*, ALA. CODE tit. 26 § 270 (1958); FLA. STAT. ANN. § 440.09 (1966); DEL. CODE ANN. tit. 19, § 2353(b) (1953) (failure to use safety devices); PA. STAT. ANN. tit. 77, § 431 (1969); TENN. CODE. ANN. § 50-910 (1966) (violation of law); N.C. GEN. STAT. § 97-12 (1965); UTAH CODE ANN. § 35-1-14 (1974) (failure to obey employer's rules).

31. *See* Comment, *Dual Capacity, supra* note 10.

32. *See* Hudson v. Allen, 11 Mich. App. 511, 161 N.W.2d 596 (1968).

ployee under workmen's compensation expressly retains his common law right to sue negligent third parties, so should he retain the right to sue if the third party is coincidentally his employer.

The dual-capacity doctrine has had limited acceptance and cannot be relied upon to provide a common law cause of action even where the employer's obligations are clearly separable. For example, in *Lewis v. Gardner Engineering Corp.*,[33] plaintiff was the foreman of a construction project managed by two joint-venture partners, Gardner and San Ore Construction Company. Gardner was also the designer and manufacturer of various pieces of equipment used on the job site. Plaintiff was injured when a hoisting clamp on a Gardner pile driver malfunctioned, allegedly because of defective design. Lewis sued Gardner under § 402A strict liability theories[34] for design defect, *after* having collected workmen's compensation for his injury from the joint venture. The court dismissed plaintiff's suit, ruling that the exclusive-remedy provision of the Arkansas Workmen's Compensation Act[35] precluded a claim in tort.

The defendant Gardner was in a classic dual capacity—as plaintiff's employer, obligated to provide safe tools, and as manufacturer, obligated to sell a non-defective and reasonably safe product. The

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33. 254 Ark. 17, 491 S.W.2d 778 (1973).

34. RESTATEMENT (SECOND) OF TORTS § 402A (1965) provides:

§ 402A. Special Liability of Seller of Product for Physical Harm to User or Consumer

(1) one who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

A parallel guarantee of quality is given the user or consumer by UNIFORM COMMERCIAL CODE § 2-314:

Section 2-314. Implied Warranty: Merchantability; Usage of Trade

(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. . . .

(2) Goods to be merchantable must be at least such as

. . . .

(c) are fit for the ordinary purposes for which such goods are used . . . .

35. ARK. STAT. ANN. § 81-1304 (1960).

employer's failure in *Gardner Engineering* to provide a "safe" hoist was the type of occupational risk explicitly covered by the applicable workmen's compensation statute; for breach of this obligation, the employee's remedy was properly limited to a statutory compensation claim. As a manufacturer, Gardner owed a duty to *all* users to market a product not "in a defective condition unreasonably dangerous,"[36] including those users who nonfortuitously happened to be in Gardner's employ. When a user is injured while properly using a defective and dangerous product, the loss to the user should be reallocated to the enterprise which can better distribute it to society. The risk of a manufacturer's dangerously defective design is not one of the class of risks inherent in the employment relationship which the user-employee can be presumed to assume in return for the benefits of workmen's compensation. Accordingly, the injured employee should have been permitted to rely on his alternative status as user to recover for the unreasonable risk posed by the defective product. The policy goals of strict liability should not be subverted by the fact that the injured user is an employee of the manufacturer whose product caused his injury. But the current general rejection of the dual-capacity doctrine allows exactly that end.

In addition to the dual-capacity doctrine, there exists a second exception to the exclusivity rule of workmen's compensation—an employee's suit against a co-employee or officer of the employer.[37] Although the employee accepts the risk of a certain amount of negligence on the part of the employer, he is not held to assume the risk of reckless or willful conduct by co-employees which "substantially" increases the possibility of injury to him. Nor should the employer's compensation fund bear the loss for extraordinary risk created wantonly by co-employees. By pursuing an additional claim against a co-worker for a work-related injury, plaintiff has the opportunity for more adequate compensation than workmen's compensation provides.[38]

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36. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

37. Under the fellow servant rule the employee's remedy for breach of obligation by a fellow servant was a suit against him at common law. Enactment of the workmen's compensation statutes did not abrogate that right.

38. Suits against certain co-workers, especially officers of a corporation, have a higher probability of success than most. Foundation for the suit rests on a co-worker's affirmative act which substantially increases the risk of harm to plaintiff. *See, e.g.*, Cunningham v. Heard, 134 Ga. App. 276, 214 S.E.2d 190 (1975) (suit against president for violation of safety

Courts have also permitted lawsuits by an employee against a workmen's compensation insurance carrier where the carrier's liability is based on a failure to perform a contractual obligation for the protection of the class of which plaintiff-employee is a member.[39] A carrier under an obligation to conduct safety inspections or oversee the insured's safety program can thus be successfully sued by an employee, injured at his place of employment, for a hazard which the insurance carrier's inspections should have revealed. The umbrella of the employer's exclusive remedy defense cannot be extended to cover the insurance carrier, who has an independent obligation to the injured employee. The carrier might also be considered to have a "dual capacity" with respect to the employee—that of employer's insurer, and that of third party obligor, the latter of which is the basis of the employee's suit.

The existence of an elective legislative or judicial cause of action on behalf of an employee against a third party, is a partial redress of the inequity of the injured employee's bearing the major cost of this occupational injury. But the acceptance of the dual-capacity doctrine vis-à-vis the employer has been limited, and legislatures have been reluctant to create any statutory exception to the exclusivity provisions of workmen's compensation statutes. The majority of the working force is thus left with a right to proceed only against a third party. The limited financial resources of a co-worker defendant may preclude any substantial recovery by a plaintiff from that source. Insurance carriers, once a favorite defendant for allegedly negligent safety inspections, have been given statutory immunity from suit in several states.[40] An injured workman, confronted with

statute regarding guard rails); Garchek v. Norton Co., 67 Wis. 2d 125, 226 N.W.2d 432 (1975) (negligence alleged was failure to supervise or institute safety programs and failure to instruct in use of a grinding machine). Minnesota specifically provides a right to sue a co-employee, and workmen's compensation will not bar the action even as to a corporate officer, supervisor or foreman. *See* MINN. STAT. ANN. § 176.031 (1966). Wisconsin provides that a corporate officer may be liable for an affirmative act of negligence increasing the employee's risk of injury. *See* WIS. STAT. ANN. § 102.29(1) (1973).

39. The carrier's independent obligation to plaintiff was the foundation for suit in Swain v. J.L. Hudson Co., 60 Mich. App. 361, 230 N.W.2d 433 (1975). *But cf.* Sims v. American Cas. Co., 131 Ga. App. 461, 206 S.E.2d 121 (1974) (workmen's compensation carrier enjoys immunity but can still be sued if some dual capacity exists with respect to the plaintiff-employee).

40. Illinois and Michigan thought the problem of suit against a workmen's compensation insurance carrier so serious as to mandate amendment of the state compensation statutes to prohibit such. *See* ILL. STAT. ANN. ch. 48, § 138.5(a) (Supp. 1975); MICH. COMP. LAWS ANN. § 418.131 (1967).

such a situation, must thus turn to the only available party with adequate resources—a manufacturer or supplier of goods used in the employment, who can be sued under the strict liability theory of § 402A of the Restatement (Second) of Torts.

II. Loss Distribution and the Third Party Defendant

A. *Basic Principles*

One might theorize that the statutory exclusions from suit granted both employers and insurance carriers combined with the financial unattractiveness of suits against co-workers would encourage injured plaintiff-employees to ask the courts for relief via the adoption or expansion of existing strict liability doctrines. Given the concept that "the injured party shall be made reasonably whole," it is the responsibility of the loss distribution system to insure that the financial burdens necessarily following from a compensation to an injured employee are equitably distributed. Various mechanisms for the equitable distribution of losses will be considered in this section and the sections to follow.

Of particular importance is the loss distribution mechanism in the complex relationship between the plaintiff-employee, the purchaser-employer, and the third party manufacturer sued under § 402A. Consider, for example, the situation where an employee in the course of his employment sustains severe injury from a grinding machine purchased by his employer. He claims against the employer under a workmen's compensation statute and also files suit against the manufacturer of the machine on strict liability theories. If the machine is adjudged defective and unreasonably dangerous, the manufacturer bears the expense of compensating the injured workman. The social forces which mandated the adoption of strict liability theories recognize this as the perfect example of risk distribution[41]—the manufacturer (and his insurance carrier) absorb the cost of the workman's injury as one of the costs of product manufacture for profit. The added cost to the manufacturer can easily be spread throughout society by an increase in product price. Society then bears the ultimate economic burden of compensating its subsector injured by a defective product, just as it bears the burden

41. *See* 2 F. Harper & F. James, Jr., The Law of Torts § 12.4(3) (1956) [hereinafter cited as Harper & James].

of industrial injury under workmen's compensation.

When a third party has caused injury to a workman for which the employer has paid an amount as workmen's compensation, justice demands that the loss to the innocent employer be recouped. The theory of indemnity shifts the entire loss from the employer, compelled to pay his employee's claim regardless of fault, to the wrongdoer. In order to effect this recovery, the employer is permitted to subrogate himself[42] to the claim of the employee against the third party to recoup what has been paid under workmen's compensation.[43] The entire loss suffered by the employer, fixed in amount by statute, is "foreseeable" to the third party tortfeasor, and therefore may properly be regarded as a "proximate consequence" of the tortious act for which payment must be made. The employer has a choice of three procedural avenues to indemnification: (1) he can allow the worker to get judgment and then apply for a lien on the proceeds of the recovery from the third party;[44] (2) he can join as a co-plaintiff or intervene in the employee's suit;[45] or (3) he can sue the third party directly for indemnification.[46] The loss distribution method thus shifts the burden of the injury from the workman, who is least able to bear it, to the employer who may ultimately transfer it to a third party defendant.

The scenario becomes more complex when the employer is not totally "innocent" but rather has done some affirmative act which

42. Subrogation to the employee's claim is permitted by statute in all states. *See, e.g.*, PA. STAT. ANN. tit. 77, § 671 (Supp. 1975). *See also* W. VANCE, HANDBOOK ON THE LAW OF INSURANCE 798-99 (3d ed. 1951). Indeed, employees under the original workmen's compensation statutes gave absolute control over third party claims to the employer in return for coverage of their claims. The employer had full power, under subrogation theory, to determine whether a third party would be sued at all. And if the employee pursued a third party suit without the employer's consent, he was held to have waived all right to workmen's compensation, regardless of whether the third party suit was a success. Millender, *Expanding Employees' Remedies and Third Party Actions*, 17 CLEV.-MAR. L. REV. 32, 33 (1968).

43. *See* cases collected in 2 LARSON, WORKMEN'S COMPENSATION, *supra* note 10, § 76.22 at 250.2. The debate as to whether a negligent employer should enjoy a right of subrogation continues without any real end to the controversy in sight. *See* Hardman, *The Common-Law Right of Subrogation Under The Workmen's Compensation Acts*, 26 W. VA. L.Q. 183 (1920); Note, *Workmen's Compensation: Should a Contributorily Negligent Employer be Subrogated?*, 42 IND. L.J. 430 (1967). *See also* Witt v. Jackson, 57 Cal. 2d 57, 71, 366 P.2d 641, 649, 17 Cal. Rptr. 369, 377 (1961) (Traynor, J.) (landmark holding that a negligent employer in California was henceforth denied subrogation).

44. *See, e.g.* CAL. LABOR CODE ANN. § 3852 (1971).

45. *See, e.g., id.* § 3853.

46. *See, e.g., id.* § 3856(b).

increased his employee's chance of injury. Let us assume that the grinding machine in the last hypothetical was originally supplied without a guard, making it "defective and unreasonably dangerous." Assume also that the employer has "negligently" refused to supply face shields to prevent the employee's being struck by pieces of scrap from the work piece on the grinding wheel. A grinding wheel flies apart, and pieces of it strike the unprotected worker. A guard on the machine would have contained the material and prevented the worker's injury. A faceshield on the worker could have deflected the fragments to prevent contact. Both the employer's and the manufacturer's acts are joint causes—indeed, each is a sine qua non of the employee's injury.

The argument for indemnity from the third-party which was persuasive in an innocent-employer situation is now considerably weakened. One of the basic jural postulates of civilization is the duty to repair injuries.[47] One might think that the employer and the third party manufacturer in the present hypothetical should equally bear the burden of the loss. Classic tort treatment would designate each as a joint tortfeasor, jointly and severally liable for the damage their combined acts caused. One obstacle exists to this treatment: the employer, relieved of any obligation of due care under workmen's compensation statutes, cannot be sued in tort for breach of obligation by his employee. Since the employer will not be considered a "tortfeasor" with respect to his employee, he can not be considered a "joint tortfeasor" with another party.[48] Since the statutory and absolute liability of the employer is different "in kind" from the tort liability of the third party, no common liability can result. Despite equal "fault," the employer pays only his workmen's compensation amount, and the third party is liable for the remainder of the damages. This difference in the foundation of liability also bars any attempt by plaintiff-employee to join the employer as a third party defendant in a suit against a tortfeasor. Where not statutorily specified, some courts have denied such joinder based upon

47. "One who intentionally does anything which on its face is injurious to another is liable to repair the resulting damage unless he can establish a liberty or privilege by identifying his claim to act as he did with some recognized public or social interest . . . ." R. POUND, 5 JURISPRUDENCE § 140 at 283 (1959).

48. Note, *Legislative Efforts to Distribute Loss Between Joint Tortfeasors*, 45 HARV. L. REV. 369 (1931). *See* Gregory, *Contribution Among Tortfeasors: A Uniform Practice*, 1938 WIS. L. REV. 365.

the common law rule that no contribution shall be permitted except in cases of "willful" misconduct.[49]

B. *Traditional Loss Distribution Mechanisms: Contribution Liability*

The issue of contribution has been addressed in part by the enactment, in twenty-three states, of the Uniform Contribution Among Joint Tortfeasors Act,[50] which provides rules that define the rights of contribution among parties liable to a single plaintiff.[51] Instead of resolving the issue, passage of the uniform contribution statutes created a whole spectrum of new problems with respect to existing workmen's compensation legislation. The statutes from which all contribution rights inured designated certain parties as "joint tortfeasors." Characterization of a particular defendant as a "joint tortfeasor" was a mandatory prerequisite to contribution liability. Arguably, if one could not be designated a "tortfeasor," no contribution liability could be found to exist. Thus, the employer relieved of tort obligations by workmen's compensation was one who enjoyed a total exclusion from contribution liability since he could never be designated a "tortfeasor." In order to regain some control over such

49. Despite the strict bar that "no one shall profit by his own wrong," defendants had often attempted to force contribution at common law. Since the processes by which a plaintiff in medieval England could satisfy his judgment were arbitrary at best, often a judgment was executed and satisfied against one co-defendant while the other, due to the vagaries of service of process, went scot-free. The defendant who had paid the entire amount then attempted to sue a co-defendant for "contribution of a moiety" to recover half his payment. The courts uniformly disallowed such suits, on the theory that to permit them would be to foster undesirable acts and reward wrongdoing. The exception to this rule was the situation where one wrongdoer was willfully or originally negligent, in which case the less-guilty wrongdoer could obtain contribution. PROSSER, *supra* note 2, § 79 nn.41, 44, at 521. Denial of contribution could be based on a deterrence theory as well. It was thought that the threatening prospect of each wrongdoer being held liable for the entire consequence would deter potential wrongdoers from committing wrong. *See* Thweatt's Adm'r v. Jones, 22 Va. (1 Rand.) 328, 333 (1823). Fear of contribution, at least theoretically, was important to the criminal or tortfeasor who at some point thoughtfully assessed the risk of getting caught.

50. PROSSER, *supra* note 2, § 50 at 307-10.

51. Prior to enactment of the UNIFORM CONTRIBUTION AMONG JOINT TORTFEASORS ACT, the situation existing in the states varied. Some statutes allowed contribution suits among all tortfeasors against whom a cause of action existed. Some limited contribution to those against whom a joint judgment had been rendered, on the theory that no defendant should have to contribute unless he had been allowed opportunity for his own defense. Others allowed impleader of tortfeasors by any defendant sued singly, or allowed a separate interpleader action against third parties for contribution. A few statutes allowed contribution only in trespass or libel cases, or against intentional wrongdoers; certain states rejected contribution in toto.

statutorily-immune parties, a number of legal fictions were developed.

The suit against an employer is sometimes characterized as a suit for "indemnity," rather than as a suit for contribution. While contribution attempts to justly apportion the loss, indemnity shifts the entire loss to another whose wrongdoing should force him to bear it. A contribution lawsuit which results in an apportionment of 100% of the damages to one party is then properly characterized, after the fact, as a type of indemnity lawsuit. The outcome of an indemnity lawsuit is not ruled by the characterization of a party as a "joint tortfeasor," but rather by the existence of a common law obligation on the part of a wrongdoer to reimburse those wrongdoers whose faults were the lesser.

Thus, allocation of the burden of compensation in an "indemnity" suit was generally based upon doctrines resurrected from tort law. In *City of Weatherford Water, Light & Ice Co. v. Veit*,[52] for example, a phone company employee was electrocuted by an uninsulated wire hanging near the phone pole on which he was working. The electrical company which owned the wire had failed to correct the hazard, which fact was well known to the employer-phone company. Moreover, the phone company failed to warn its employees of the danger. Two "negligent acts" thus combined to produce a foreseeable injury, for which the employee's estate sued the electrical company. The court, in evaluating the respective negligent actions of the two companies in order to allocate loss, settled upon a distinction between "active" negligence and "passive" negligence. The electric company's failure to correct the hazard was an omission amounting to "passive negligence," whereas the phone company's failure to warn was "active negligence." The electrical company was thus less responsible than the actively-negligent phone company, and so recovered indemnification from the phone company for amounts paid the workman's estate. Difficulties with assessing comparative fault in this situation led to adoption of an all-or-none rule of recovery for the "indemnified" party. Although justice required an attempt to make some distribution of loss when there was clear and complementary negligence by more than one party, the court in *Weatherford* was content to resolve the important issue of ulti-

52. 196 S.W. 986 (Tex. Civ. App. 1917).

mate loss apportionment using the obfuscated test of active versus passive participation.

No less unsatisfactory is a resolution of the comparative liability of parties based upon the "last clear chance" doctrine.[53] This chronological test is used to apportion all loss to the party who had the last reasonable opportunity in time to prevent the injury. The theory is that only the last negligence in time was the "proximate" cause of the injury. No consideration is given to the relative "wrongfulness" of the defendants' successive actions, and the one who could have halted the disaster is charged with all liability flowing from the incident. The last wrongdoer is determined to be the worst wrongdoer and must indemnify all those prior to him in time regardless of the qualitative degrees of their contribution to the injury. One wonders what the result would be in a case where the wrongdoer who had the last clear chance to prevent the injury was also the "passive" wrongdoer.

The absurdity of rationale and the unpredictability of result where loss allocation is ruled by legal fictions like "last clear chance" or "active-passive negligence"[54] should cause courts to ad-

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53. The "last clear chance" doctrine holds that the negligence of the one who had the last reasonable opportunity to avoid the injury is properly designated the proximate cause of the injury, regardless of relative fault. There has been much disagreement about the viability of last clear chance. *See, e.g.*, Green, *Contributory Negligence and Proximate Cause*, 6 N.C.L. REV. 3 (1927); James, *Last Clear Chance: A Transitional Doctrine*, 47 YALE L.J. 704 (1938); Smith, *The "Last Clear Chance" Doctrine*, 82 CENT. L.J. 425 (1916).

The origin of the doctrine in Davies v. Mann, 152 Eng. Rep. 588 (Ex. 1842), which held a defendant liable for failing to utilize "the last clear chance" to avoid running into plaintiff's donkey, has combined with the absurdity of some of its results to give it the popular name of "the jackass doctrine."

The RESTATEMENT (SECOND) OF TORTS § 441 (1965) phrases it as follows:

> A plaintiff who has negligently subjected himself to a risk of harm from the defendant's subsequent negligence may recover for harm caused thereby if, immediately preceding the harm,
>
> (a) the plaintiff is unable to avoid it by the exercise of reasonable vigilance and care, and
>
> (b) the defendant is negligent in failing to utilize with reasonable care and competence his then existing opportunity to avoid the harm, when he
>
> (i) knows of the plaintiff's situation and realizes or has reason to realize the peril involved in it or
>
> (ii) would discover the situation and thus have reason to realize the peril, if he were to exercise the vigilance which it is then his duty to the plaintiff to exercise.

54. The active-passive distinction becomes an important one in those cases where two separate negligent acts in combination bring about one indivisible result. THE RESTATEMENT (SECOND) OF TORTS § 441, comment *b*, sets forth the distinction thusly:

dress the real issue of comparative negligence to determine where loss shall fall.

A standard that would more comport with the principle of equitable loss apportionment is that of *pari delicto*. If parties are "*in pari delicto*"—each with "fault of the same degree and kind"—neither can be totally indemnified by the other. Most cases involving negligence on the part of employers and third party manufacturers can be resolved by application of *pari delicto* principles. Rather than making contribution cases into false indemnity actions, or employing the fictions of "active-passive negligence" or "last clear chance," a court's consideration of the parties' *pari delicto* status would necessarily address the issue of the relative degree of fault of each party. The all-or-nothing recovery characteristic of indemnity suits would then be available only on a finding that the respective faults of the parties were significantly different either in degree or kind.

The standard of *pari delicto* still does not resolve the issue of loss apportionment for an employee's injury between the negligent employer and a third party. The statutory definition of the employer's liability as exclusive and absolute makes it impossible to find liability "the same in degree and kind" as that of the third party sued in tort—as is required for the *pari delicto* status. Since there can be no contribution between parties *in pari delicto*, it would seem that no contribution recovery between a third party tortfeasor and a negligent employer can be allowed.

The inequity created by forcing the entire loss onto a third party is apparent. Not only does the third party have no affirmative right to force the employer to pay his equitable portion, but the employer has an affirmative right under subrogation theories to recover from the third party the sums paid as workmen's compensation. Yet to allow the negligent employer to escape economically unscathed is contrary to the principles of equity and justice.[55] The philosophy of

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The cases in which the effect of the operation of an intervening force may be important in determining whether the negligent actor is liable for another's harm are usually, although not exclusively, cases in which the actor's negligence has created a situation harmless unless something further occurs, but capable of being made dangerous by the operation of some new force and in which the intervening force makes a potentially dangerous situation injurious. In such cases the actor's negligence is often called passive negligence, while the third person's negligence, which sets the intervening force in active operation, is called active negligence.

55. It was phrased more poetically by Justice Traynor: "When the employee or his estate

workmen's compensation in allocating losses for an employee's injury by insurance as a cost of production within that enterprise is totally defeated by shifting such cost entirely to another enterprise. The equitable foundation of compensation law that demands of each party only his fair share of the damages is totally subverted. The already slight punitive effect of the compensation award assessed against the employer's insurance fund is nullified in toto. And, perhaps most importantly, the deterrent effect that numerous awards might have upon the employer's continuation of practices hazardous to his employee's life and limb is destroyed.

In spite of the overwhelming equitable reasons for denying subrogation rights to the negligent employer, some forty-seven states continue to permit some form of subrogation. At the same time, strict interpretations of the joint-tortfeasor requirement of the Uniform Contribution Among Tortfeasors Act deny to a third party any hope of allocating a fair share of the loss to the negligent employer. This combination results in particular injustice for the defendant liable under § 402A theories for an industrial accident.

C. *The Industrial Accident Cases: Causation and Liability*

Under § 402A strict liability, it is well settled that a manufacturer who fails to equip a product with safety devices, the absence of which creates an unreasonable risk of harm to the user, can be held liable for that harm.[56] Plaintiff, of course, has the burden of proving

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has been satisfied, and the employer seeks to recover the amount paid by him, from such third party, his hands ought not to have the blood of the dead or injured workman upon them, when he thus invokes the impartial powers and processes of the law . . . ." Witt v. Jackson, 57 Cal. 2d 57, 71, 366 P.2d 641, 649, 17 Cal. Rptr. 369, 377 (1961), *citing* Brown v. Southern Ry., 204 N.C. 668, 669, 169 S.E. 419, 420 (1933).

56. In Bexiga v. Havir Mfg. Corp., 60 N.J. 402, 410, 290 A.2d 281, 285 (1972), the court stated:

> Where a manufacturer places into the channels of a trade a finished product . . . which should be provided with safety devices because without such it creates an unreasonable risk of harm, and where such safety devices can feasibly be installed by the manufacturer, the fact that he expects that someone else will install such devices should not immunize him. The public interest in assuring that safety devices are installed demands more from the manufacturer than to permit him to leave such a critical phase of his manufacturing process to the haphazard conduct of the ultimate purchaser.

See also Mahoney v. Roper-Wright Mfg. Co., 490 F.2d 229 (7th Cir. 1973); Pike v. Frank G. Hough Co., 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970); Balido v. Improved Mach. Co., 29 Cal. App. 3d 633, 105 Cal. Rptr. 890 (1973); Rivera v. Rockford Mach. & Tool Co., 1 Ill. App. 3d 641, 274 N.E.2d 828 (1971); Wright v. Massey-Harris, Inc., 68 Ill. App. 2d 70, 215 N.E.2d 465 (1966); Finnegan v. Havir Mfg. Corp., 60 N.J. 413, 290 A.2d 286 (1972); Palmer v. Massey-Ferguson, Inc., 3 Wash. App. 508, 476 P.2d 713 (1970).

that the defective and unreasonably dangerous product was both the proximate cause and the cause in fact of the injury sustained. If an act of some third party constitutes an intervening and superseding cause of the injury, the causation claim between the injury and the product is broken, and there can be no liability under § 402A against the seller of the product.[57] A § 402A defendant cannot escape all liability merely because of a third party's intervening act which contributes to plaintiff's harm.[58] If the third party's act was a "foreseeable consequence" of the § 402A defendant's breach of duty, the § 402A defendant will not be excused from liability.[59]

The Restatement (Second) of Torts offers several factors to be taken into consideration when a shift of liability due to an intervening cause is being considered:

> the degree of danger and the magnitude of the risk of harm, the character and position of the third person . . . his knowledge of the danger and the likelihood that he will or will not exercise proper care . . . . The most that can be stated here is that when, by reason of the interplay of such factors, the court finds that full responsibility for control of the situation and prevention of the threatened harm has passed to the third person, his failure to act is then a superseding cause, which will relieve the original actor of liability.[60]

When the manufacturer of a machine has met his obligation by furnishing a safety device necessary for the protection of the workmen, its removal by the owner of the machine constitutes a su-

57. For example, in Pike v. Frank G. Hough Co., 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970), a paydozer (a large earth moving machine used at construction sites) was adjudged defective and unreasonably dangerous because it had no rear-view mirrors. The absence of this safety device made it impossible for the driver to see any workers at the rear of the machine; while backing up the machine, the driver struck and killed plaintiff's decedent. The lack of rear-view mirrors was a cause in fact and the proximate cause of the worker's death. But had the driver deliberately and maliciously steered the paydozer so as to strike the decedent, the driver's conduct would have been an "intervening and superseding" cause relieving the manufacturer of § 402A liability.

58. *See, e.g.*, Rhoads v. Service Mach. Co., 329 F. Supp. 367 (E.D. Ark. 1971); Dorsey v. Yoder Co., 311 F. Supp. 753 (E.D. Pa. 1971), *aff'd sub nom.*, Yoder Co. v. General Copper & Brass Co., 474 F.2d 1339 (3d Cir. 1973).

59. Thus, if a defendant fails to add a rear-view mirror to his paydozer, it is foreseeable that the operator may begin to back the machine without jumping from it to check for the presence of workers behind him. The third-party driver's act of negligence in not checking to the rear is, therefore, a forseeable consequence of the failure to provide mirrors. In such a case, there will be no shift of liability from the manufacturer to the third party.

60. RESTATEMENT (SECOND) OF TORTS § 452, comment *f* (1965).

perseding cause which shifts liability away from the manufacturer.[61] But what of the situation where the obligation to furnish a safety device is placed, by law, on the purchaser/user of the machine?[62] Can the manufacturer who fails to furnish the safety device plead that the intervening negligence of the buyer in not supplying the guard relieves the manufacturer of liability? To hold a user to a duty of providing a guard which a manufacturer thought unnecessary seems manifestly unfair. Attempts by manufacturers to evade liability by claiming it to be the purchaser's responsibility to install a required device have usually been unsuccessful in light of the manufacturer's overwhelming familiarity with the operating characteristics and potential hazards of his machine. In such cases, the courts are understandably reluctant to relieve the manufacturer of his obligation to design a reasonably safe product by shifting the blame to a third party on superseding-negligence grounds.

A far different liability picture is presented when a third-party employer's negligence combines with a "defective" product to culminate in an injury to the third party's employee. Assume, for example, that a manufacturer has provided a guard over the revolving shaft of a washing machine. The guard is necessary to prevent the rotating shaft's entangling the clothing or equipment of workers in the machine's vicinity. The employer orders the guard removed and subsequently an employee is injured in the exact manner that the guard was intended to prevent.[63] The injured employee has two remedies: (1) he can claim under workmen's compensation and (2) he can sue the manufacturer for a design defect alleging that the guard should have been permanently affixed to the machine. The suit against the manufacturer is sure to be pursued, given the possibility of total compensation that it presents. A jury, asked to decide between a disabled worker and the enterprise which markets the product which injured him, may shade the technical issues of defect and causation in order to arrive at a verdict for the plaintiff. The manufacturer must assimilate the full cost of the injury into his fixed costs, but the employer gets away with a minimum payment under the workmen's compensation statute, which payment may be recouped from the manufacturer by subrogation.

61. *See* Smith v. Hobart Mfg. Co., 302 F.2d 570 (3d Cir. 1962).

62. *See, e.g.*, PA. STAT. ANN. tit. 43, §§ 25-1 to -15 (1964). *See also* Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-78 (1970).

63. *See, e.g.*, Hartman v. Miller Hydro Co., 499 F.2d 191 (10th Cir. 1974).

1. *The Grinding Wheel Cases*

Another hypothetical will further illustrate the inequity of the present system. Assume a manufacturer of grinding wheels supplies various types of wheels to industrial concerns for use on their own grinding machines. Despite various design innovations, grinding wheels have a propensity to disintegrate after long periods of use. The wheels are formed of an abrasive material laminated to a central core, which is usually reinforced to withstand the stresses produced by rotation at the very high speeds characteristic of the grinding operation. The reinforcement minimizes the stresses on the abrasive, but no design yet developed can guarantee a wheel which will not fly apart after hours of punishing use. However, one design solution has been developed to negate the possibility of an employee's being injured by flying pieces from a disintegrating grinding wheel. That solution is a guard on the machine itself, which contains the flying pieces should a wheel fail in use. Under most state laws, it is the legal responsibility of the employer to install such a guard.[64]

When an employer removes a guard or fails to provide one, his negligence becomes a proximate cause of his employee's injury due to disintegration of the wheel. Yet the only sanction against the employer is his payment of a workmen's compensation claim.[65] The third party grinding wheel manufacturer who loses to the employee on a § 402A claim pays him full compensation, and in most states also must reimburse the employer for amounts he paid the employee under the workmen's compensation statute. No attempt is made to weigh the employer's contribution to the employee's injury and to assess him a fair share of the costs of such injury.

The grinding wheel manufacturer may attempt to warn prospective users of the danger of performing a grinding operation without a guard by stamping on the wheel itself "Use Safety Guard." The

64. *See, e.g.*, PA. STAT. ANN. tit 43, § 25-1 (1964).

65. Injured employees have forced courts to weigh the interest of the employer in being free from suit at common law by alleging that the employer's conduct was so reprehensible as to remove him from the purview of the workmen's compensation statute. *See, e.g.*, Santiago v. Brill Monfort Co., 205 N.Y.S.2d 919 (App. Div. 1960), *aff'd*, 10 N.Y.2d 718, 176 N.E.2d 835, 219 N.Y.S.2d 266 (1961), where the employer removed safety guards in a deliberate effort to increase production, the negligence was alleged to be so outrageous as to constitute an assault. The court held that the employer's negligence was not so outrageous as to give rise to a separate cause of action for the employee who could recover under the workmen's compensation statute.

employer purchasing the wheel certainly can be said to have received notice of the danger from such a warning. But even a warning such as this is no guarantee of immunity from suit on § 402A grounds. In *Bituminous Casualty Corp. v. Black & Decker Manufacturing Co.*,[66] an employee was injured by flying pieces of a grinding wheel sold but not manufactured by Black & Decker. Plaintiff sued Black & Decker for placing on the market a wheel unreasonably dangerous to the public and for failing to warn users of its dangerous propensities. The wheel in question had the standard label attached, which contained the following information: "Warning: Thread wheel on spindle by hand. Do not thread wheel by starting motor. Use Safety Guard." Despite the presence of this label on every wheel purchased by plaintiff's employer, no safety guards had been purchased for any of the grinding machines.

The injured employee settled before trial but the employer's compensation carrier, Bituminous, continued the suit under a subrogation theory against Black & Decker to recover amounts it had paid to the plaintiff as workmen's compensation. The crucial issue at trial was that of the sufficiency of the warning on the grinding wheel. The plaintiff claimed that since a grinding wheel was "inherently dangerous," the seller had a duty to supply warnings as to the risks and dangers involved in the product's use. The defendant countered that the intervening negligence of the employer broke the causation chain. The trial court rendered a verdict for defendant, but the appellate court reversed. Plaintiff had argued that the "injury" to the employee resulted from the "foreseeable misuse" of the grinding wheel without a safety guard on the machine. The appellate court accepted the argument that an "adequate" warning would have prevented the foreseeable consequence of the employee's injury by causing both employee and employer to heed the warning to "Use Safety Guard." Since the instant warning had not, clearly, it was an inadequate one.

What more can be asked of a grinding wheel manufacturer. He recognizes his product is inherently dangerous beyond a level which any design modification can cure. He realizes that the one certain safeguard against injury when a wheel disintegrates is a guard on the machine. He stamps a label on his product that it should not be used without a safety guard on the machine. A more detailed

66. 518 S.W.2d 868 (Tex. Civ. App. 1974).

warning could just as easily be ignored: "Possibility of severe injury or death exists if you are struck by pieces of this grinding wheel should it disintegrate. The only way to avoid injury is to use a safety guard on your machine."

The grinding wheel cases do not address the key issue—the intervening negligence of the machine owner in refusing to purchase guards for the grinding machines. To say that an adequate warning by the wheel manufacturer is the solution to the entire problem, as the court in *Black & Decker* did, is a simplistic evasion of the real issue. Until the law imposes legal responsibility upon the owner for failing to exercise that minimum caution demanded of a reasonable man, no manufacturer's warning will compel that caution, and the employee will continue to be confronted with the equally-repugnant alternatives of a dangerous work environment or no work at all.[67]

2. *Retrofitted Safety Device Cases*

In their efforts to mete out justice in safety-device design cases, courts have been confronted with numerous complex permutations and refinements of the basic premise that a design marketed without a safety device may constitute a defective design. What circumstances will excuse a manufacturer from liability for a design placed on the market without such a device, the presence of which would have averted an unreasonable risk of injury to users?

Assume, for example, that a manufacturer determines, several years after the distribution of a certain machine, that a safety guard is necessary to prevent an unreasonable risk of injury. He undertakes to notify all purchasers of the availability of a safety device at a reasonable price or offers to install the device entirely at his own expense. An advertising campaign advises purchasers of the importance of retrofitting the guards to their machines. For reasons of their own, a substantial number of purchasers decline the tender of the safety device, fully aware of the unreasonableness of their decision. An employee of one of the "unreasonable" purchasers is then injured by the admittedly dangerous unguarded machine. Since the manufacturer must concede the defectiveness of the design, he will—when suit is filed by the injured user—rest his case on the

67. The unattractiveness of the alternative to assuming this risk—that of the employee's being fired for refusing to work on an unguarded machine—is of course legally irrelevant to temper the voluntariness of his decision.

causation issue, pleading that the cause of the injury is in fact the purchaser's failure to install the safety device recommended by the manufacturer. The manufacturer pleads that all reasonable steps have been taken to correct the error in design, and that the purchaser's willful and knowing refusal to install the device is a superseding cause of the injury as a matter of law.

This is illustrated in *Balido v. Improved Machinery Co.*,[68] wherein plaintiff-employee's right hand was crushed in a molding press owned by her employer, Olympic Plastics Co., and manufactured by defendant, Improved. At the time of its manufacture in 1950, the press had been equipped with a lift-type safety gate which, when fully closed, covered the operating area of the press. As the gate closed, it barred employee access to the danger area and closed an electric switch enabling the machine to begin the molding operation. After the press had been on the market for several years, the manufacturer redesigned the safety gate to comply with a 1949 California industrial safety order requiring that all plastic presses be equipped with a sliding safety gate rather than a lift-type gate. In 1954, the manufacturer incorporated into all presses the new gate design and then offered for sale to all owners of the pre-1954 presses a safety package which would bring the presses into compliance with the safety order. The manufacturer notified Olympic that its press failed to meet current safety standards and suggested that Olympic purchase the safety package. Despite several notices to this effect, Olympic refused to purchase the device. In 1965, the plaintiff was injured when the press closed as she moved the safety lift gate to rearrange a workpiece on the machine. Both the trial court and the court of appeals considered the crucial causation argument that Olympic's failure to install the new safety gate was a superseding cause relieving the manufacturer of design liability.[69]

68. 29 Cal. App. 3d 633, 105 Cal. Rptr. 890 (1973).

69. *Cf.* Bexiga v. Havir Mfg. Co., 60 N.J. 402, 290 A.2d 281 (1972) wherein the manufacturer had sold a power press without any safety devices. Custom in the trade was for the purchaser to install any devices that his individualized operations might require. The court held that the question of whether the purchaser's failure to add devices constituted a superseding cause depended on the foreseeability, from the manufacturer's standpoint, of the purchaser's failure to do so. *Accord*, Finnegan v. Havir Mfg. Co., 60 N.J. 413, 290 A.2d 286 (1972). *Cf.* Rhoads v. Service Mach. Co., 329 F. Supp. 367 (E.D. Ark. 1971) where a press had been shipped with a sign warning that it was not to be used without a safety guard. The owner of the press failed to install a guard even though cited by the state department of labor for failure to do so. The court rejected the manufacturer's argument that the owner's neglect relieved the manufacturer of liability, noting that it was foreseeable that a purchaser might

The case was factually distinguishable from the line of cases wherein a manufacturer makes no effort to make available a safety device or to emphasize the need for one, yet attempts to shift the responsibility for installing one to the purchaser—these decisions consistently deny such a shift of responsibility. The very action upon which the manufacturer bases his request for a release from liability is a foreseeable consequence of the manufacturer's original failure to make available such a device. To ask a purchaser to install a device that a manufacturer in his superior design experience thinks unnecessary is to ask that purchaser to spend money on an item of dubious value. It is only when the manufacturer has taken all reasonable steps to convince the purchaser of the necessity for installing the device that a shift in responsibility should even be considered.

The manufacturer who attempts to correct a design deficiency as the manufacturer in *Balido* did is in an extremely difficult position.[70] If the court decides that the liability-triggering event is the placing on the market of a defectively designed product, any effort at correction after the fact, regardless of how noble it is, will not bar strict liability. If the decision turns upon causation, the foreseeability of the purchaser's admittedly unreasonable refusal to install a safety device eliminates that as a superseding cause of the injury. Of what use is it, then, for a manufacturer to undertake an expensive recall or retrofit program to correct a design deficiency? A substantial number of purchasers may be unlocatable due to lapse of time or subsequent resale(s) of the product. Some of the owners may remain unpersuaded as to the merits of the program and refuse to upgrade their equipment. The manufacturer's liability exposure for

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fail to heed a warning or comply with a state statute as a consequence of the manufacturer's failure to include a guard in the original design.

70. A termination of design liability under negligence theories has been permitted in cases where the manufacturer has taken all reasonable care to correct the defect. *See, e.g.*, Ford Motor Co. v. Wagoner, 183 Tenn. 392, 192 S.W.2d 840 (1946), where an auto manufacturer was relieved of liability for a defective hood design by its good-faith efforts to correct the error by installing a new hood-latch free of charge to purchasers. Plaintiff had purchased his auto from a prior owner who had refused the manufacturer's tender, and this refusal was held to be a superseding cause insulating the manufacturer from harm. In Rekab, Inc. v. Frank Hrubetz & Co., 261 Md. 141, 274 A.2d 107 (1971), the manufacturer of an amusement park ride determined that a stronger spindle was needed in the ride. It issued a letter to all purchasers that warned them not to set the ride up for the forthcoming season without installing a heavy duty spindle which the manufacturer was shipping at his cost. The failure of the park owner to heed the warning was held to insulate the manufacturer from liability.

his breach of the threshold design duty has been decreased very little. The only decrease in liability is that inuring from the class of users whose employers have seen fit to heed the message of the recall program, and that number may be small indeed. The cost of the correction program thus appears to be considerable without guaranteeing any substantial return on the investment in the form of decreased liability. A reasonable economic decision on the part of the manufacturer might be to discontinue all defective design correction attempts, regardless of how socially desirable they may be.

Under risk allocation theories,[71] the risk of loss as between an injured user and the manufacturer of the defective machine must be allocated to the enterprise. But when loss is to be allocated between a manufacturer that has done everything reasonable to correct a deficiency and a purchaser's enterprise that has deliberately precluded the success of the correction effort by refusing to participate in it, it is the purchaser's enterprise that should bear the loss. As between the two, the purchaser is clearly more capable of preventing the harm and more culpable for not having done so. Admittedly, there is a problem in identifying any classical tort duty on the part of the purchaser which would support an action by the manufacturer for failure to do an affirmative act which would save the manufacturer from harm. Willful failure to install a safety device is a breach of the employer's obligation to his *employees*, for which he is relieved of liability under the workmen's compensation statute. The manufacturer cannot be heard to complain that the breach of the employer's obligation to his employees has resulted in harm to the *manufacturer*. The manufacturer finds himself in an unenviable position rather like that of the drowning man whose neighbor owes him no legal duty to do an affirmative act which would save his life.

3. *Component Manufacturing Cases*

Focusing on the owner's capability of avoiding harm leads to an even stronger conclusion of culpability in product liability cases involving component manufacturers. In *Taylor v. Paul O. Abbe, Inc.*,[72] plaintiff-employee sustained severe injury when his right

71. The deterrent theory of enterprise liability is discussed in 2 HARPER & JAMES, *supra* note 41, §§ 11.4(3), 13.2.

72. 516 F.2d 145 (3d Cir. 1975).

hand was caught in the nip point of two interlocking gears of a pebble mill. The mill was owned and operated by plaintiff's employer, Superior Zinc Co., and had been purchased by them in 1909 from a manufacturer that was not a party to the suit. The employer was impleaded as a third party defendant in the plaintiff's product liability suit against the parts supplier, Abbe. Abbe had contracted to supply replacement parts for the pebble mill, and had furnished, *inter alia*, the two gears into which plaintiff's hand had been pulled. Abbe had offered to provide a guard over the machine at the point at which the gears meshed, but this offer had been rejected by the employer. Plaintiff alleged that the lack of a guard over the gears and the lack of an on-off switch located near the operator were defects which made the mill unreasonably dangerous. The crux of the case was the alleged liability of the parts supplier, Abbe, for failing to correct the design defects existing in the machine. Plaintiff argued that the guard was an integral part of the "functioning unit," *i.e.*, the two gears, sold by Abbe. The court disagreed, holding that as a matter of law a parts supplier was not responsible for the absence of a guard if a bona fide offer to supply the safety device had been made but rejected.[73] As between the employer and the parts supplier, the risk of loss was allocated to the enterprise more clearly capable of averting the injury. It would be unreasonable to place on the supplier the burden of demanding that a purchaser order a safety device as a precondition to the remainder of the sale. But as between the employee and his employer, the decision that responsibility for the absence of the guard is the employer's would be a meaningless exercise in light of workmen's compensation. De-

73. The court allocated responsibility for the lack of the guard thusly:

> Of critical importance in this case is the undisputed testimony that Abbe offered to sell such a guard to Superior but that Superior refused it. Under these circumstances, we think it clear that the responsibility for the absence of the guard should be placed on Superior rather than Abbe, since Superior was the party which made the decision as to the composition of the fully assembled mill.

Id. at 148. *But compare* Lockett v. General Elec. Co., 376 F. Supp. 1201 (E.D. Pa. 1974) where a supplier had provided several gears to a shipbuilder without any guard. The court held that the supplier was under no duty to furnish a guard or to make inspections or tests to determine the necessity for one. Nor was the supplier under any obligation to find out if the shipbuilder planned to install a guard. The only liability might be if the supplier had reason to believe that the user would not realize the danger of operation without a guard, and failed to advise him of the necessity for one. It is arguable whether the failure to tender a guard per se is actionable against a supplier, who has no mechanism for coercing his purchaser into accepting the tender and who may be at a considerable disadvantage with the purchaser if he tries to press the point.

spite the fact that the employee does not accept as a risk inherent in the employment relationship his employer's deliberate disobedience of a safety statute or of a supplier's well-taken warning, the employee has no cause of action against his employer. The uncompensated portion of the loss for the injury falls squarely on the shoulders of the one least able to have prevented it or distributed it. The court's allocation of responsibility for the injury to the employer is but a slap on the wrist in light of the employer's exemption from liability under workmen's compensation.[74]

4. *The "Failure to Warn" Cases*

The supplier or manufacturer meets his legal obligation when the means chosen to convey a warning or instruction critical to safe use of a product are reasonably designed to apprise the ultimate user of the dangers inherent in product use.[75] But how is the liability issue to be resolved when a manufacturer issues adequate warnings which nevertheless fail to reach the ultimate user due to the intervention of a third party? The easy answer to the liability question is to affix liability on the intervening third party whose negligent action may have disrupted the transmittal of the warning to the injured user.

In *West v. Broderick & Bascom Wire Rope Co.*,[76] a plaintiff iron worker was injured when a wire rope used for pulling heavy machinery broke. The rope, whose ultimate breaking strength was eighteen tons, was rated for safe use at one-fifth of that capacity (3.6 tons) to avoid the possibility of injury to users. The machinery for which the rope was being used at the time of the injury to plaintiff was a fifty-four and a half ton press, a load three times greater than

74. *Cf.* Bond v. Transairco Co., 514 F.2d 642 (5th Cir. 1975).

75. Under developed § 402A principles, a manufacturer has an affirmative duty to warn purchasers and users of a product's dangerous characteristics particularly if the risk posed by the product is an unobvious one. Maize v. Atlantic Refining Co., 352 Pa. 51, 41 A.2d 850 (1945). The product should be accompanied by such labeling, instructions or warnings necessary to convince a reasonably-prudent user of the dangers of product misuse. The duty to warn extends to any chattel intrinsically dangerous for the uses for which they are supplied, such as an explosive. *See, e.g.*, Doss v. Apache Powder Co., 430 F.2d 1317 (5th Cir. 1970); Eck v. E.I. DuPont DeNemours & Co., 393 F.2d 197 (7th Cir. 1968); Callahan v. Keystone Fireworks Mfg. Co., 72 Wash. 2d 823, 435 P.2d 626 (1967). The duty also pertains to products which only became dangerous when acted upon by external forces—such as a paint product, dangerously combustible when exposed to heat. Panther Oil & Grease Mfg. Co. v. Segerstrom, 224 F.2d 216 (9th Cir. 1955); Crane v. Sears, Roebuck & Co., 218 Cal. App. 2d 855, 32 Cal. Rptr. 754 (1963).

76. 197 N.W.2d 202 (Iowa 1972).

the maximum the rope could sustain and fifteen times greater than its advisable load. The manufacturer had prepared literature describing the ultimate breaking strength and safe working capacities of its various wire ropes. Each rope also carried a metal tag which listed its working capacity. The manufacturer had sold the rope to a supplier who had resold it to plaintiff's employer. Somewhere in that distributive chain, the descriptive literature and metal tags became separated from the rope, so that the warning as to safe working capacity never reached the ultimate user of the product. The employees responsible for moving the press testified that had they known the rated capacity of that rope, they never would have attempted to use it.

Upon whom should ultimate liability rest for the severe injuries sustained by plaintiff in a case such as this?[77] If the manufacturer's choice of a warning mechanism is shown to be a reasonable one, his duty to the ultimate user has been fulfilled. If the warning is adequate, but a third party has removed the warning from the product, the "cause" of user injury is not a breach of the duty to warn *ab initio* but rather the intervening negligence of a third party. It seems only proper and just to charge the negligent third party with responsibility for the user's loss. The logic fails only when that third party is also the employer, immune from suit by workmen's compensation statute.

The statutory immunity of the employer in failure-to-warn cases poses a serious barrier to a court's attempt to do justice. Often the employer, as the buyer of the product, receives all descriptive information and warnings that the manufacturer has thought necessary to provide so as to fulfill his legal obligation. The employer then may fail—perhaps carelessly, perhaps with deliberate disregard for the user's welfare—to transfer the requisite information to the employee, the "ultimate user" of the product. The harm that results is exactly that which the manufacturer's warnings sought to prevent. Nevertheless, the only avenue of recovery for the injured employee is a claim against the manufacturer of inadequate warning. At some point, the intervening negligence of the employer becomes

77. In West v. Broderick & Bascom Rope Co., 197 N.W.2d 202 (Iowa 1972), the jury found against the defendant manufacturer on the issue of adequacy of the warning placed on the wire rope, despite uncontroverted testimony by defendant that defendant had issued descriptive literature suggesting appropriate working capacities for each size and had placed a metal tag listing the safe working capacity on each rope at manufacture. The Supreme Court of Iowa refused to overturn the verdict on appeal.

important enough to constitute the sole legal cause of the injury, and the employee's suit against the manufacturer fails on this causation issue. This same negligence which constitutes a proximate cause of the injury cannot afford any basis for recovery by the employee.

In *Bryant v. Hercules, Inc.*,[78] personal representatives of eight coal miners fatally injured in a mine explosion sued a dynamite manufacturer. The explosion was caused when a fragment projected from the blasting area struck and detonated a quantity of explosives stored forty-five feet from the blasting. The complaint alleged a failure to warn of the emplosives' dangerous propensity to detonate upon impact and failure to instruct in its safe use. The manufacturer supplied with each delivery a consumer's guide to handling, storing and using explosives. The guide cautioned the user to make sure that all surplus explosives were "in a safe place" when blasting was being done and not to place explosives where they might be exposed to "flame, heat, sparks or impact." Of relevance was the statutory obligation placed on the employer coal company with respect to storage of explosives—both the federal and state mine safety codes[79] had established mandatory procedures for storing unused explosives away from blasting sites. All of the employer's supervisory personnel were aware of the danger of storing unused explosives where a shock might cause premature detonation. Indeed, prior to the date of the fatal explosion, federal mine inspections had cited the defendant's mine five times for violations of the regulations on explosives storage. The explosives responsible for the fatal accident were stored in violation of both the federal and the state statutes. The court, in *Bryant*, correctly determined that the willful negligence of the coal company in disregarding all warnings amounted to a superseding cause that severed whatever causal connection there might have been between the manufacturer's omission of an adequate warning and the deaths resulting from the explosion. Nor was the manufacturer held liable for failing to foresee that one user (the employer) would behave so negligently toward a second user (the miners) as to totally disregard all precautions for the second user's safety. The manufacturer had a duty to warn users of the product's dangerous propensities so that users could avoid

78. 325 F. Supp. 241 (W.D. Ky. 1970).

79. Federal Mine Safety Code, 30 U.S.C. §§ 873 (f), (g) (1970); KY. REV. STAT. ch. 352.241(7) (1972).

injury by an appropriate modification of their behavior. The plaintiffs' last resort, the contention that the manfuacturer's warning was inadequate because it failed to influence the conduct of the ultimate users, was not considered persuasive by the court.

The facts which should have determined liability were the coal company's total indifference to both the manufacturer's warnings and the statutory prohibitions against storing explosives too near a blasting site. The practical effect of such an adjudication of gross negligence on the part of the coal company would ordinarily be a corresponding obligation of total reparation for the injury. Since the coal company was the statutorily-exempt employer of the victims, state law provided that a determination of statutory negligence would trigger payment of an additional 15%[80] over the workmen's compensation benefits as a penalty—a fact which no doubt was a small consolation to the plaintiff-survivors. When the only economically-feasible defendant is a supplier of the product that occasioned the injury, it is not surprising for a plaintiff to adduce any theory of defect, regardless of how unsubstantiable, in an effort to get his case before a jury. The plethora of product liability lawsuits is testimony to the fact that recovery for industrial accidents under the workmen's compensation statutes is woefully inadequate.

III. "The Most Evenly-Balanced Controversy"

A. *The Economic Model for Loss Distribution*

The allocation of loss for employee injury between a negligent employer and a third party tortfeasor has been called "the most evenly-balanced controversy" in tort law.[81] Contrariwise, the statutory bar of workmen's compensation statutes has been extended into an area which was not originally contemplated—where a third party tortfeasor is denied the right to contribution from a negligent employer. The present system of awarding total recovery to one party, the employer, by allowing him to recover his compensation award by subrogation to the injured employee's action against the third party tortfeasor is contrary to the equitable principles of loss

80. Ky. Rev. Stat. ch. 342.165 (1973).

81. 2A Larson, Workmen's Compensation, *supra* note 10, § 76.10 at 287.

distribution. The current evasion of responsibility by a negligent employer cannot be reconciled with either of the societal interests served by a well-conceived loss-adjusting mechanism: "to make the injured party whole, and to seek out the true wrongdoer whenever possible."[82] The criticism leveled against the common law rule barring contribution among tortfeasors is applicable here: "There is obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be shouldered onto one alone . . . ."[83] Nor are principles of equity served when the law orders one equally-culpable obligor to be relieved of his minimum statutory share of the cost of injury, resulting in an unjust enrichment of the employer totally repugnant to law and equity.

The economic model of loss distribution assumes that the cost of injury will be borne by the enterprise most capable of reallocation. When a loss within one enterprise, the employer's, is shifted in toto to that of the product manufacturer, the loss distribution model fails. The perfect working of the system assumes that the enterprise upon which the loss is fixed will be capable of spreading the cost to society over a period of time by increasing product prices. When the manufacturing enterprise is asked to bear the cost of workmen's compensation properly allocatable to the employer, that enterprise may find it difficult to recoup its losses from society quickly enough.[84] The ultimate result of the unfair reallocation of the entire compensation burden to manufacturing may result in burdening

82. *Id.*

83. PROSSER, *supra* note 2, § 50 at 307.

84. The imperfections in the enterprise's allocation process may result in an inability to recover its costs from society via a price raise. The additional burden of strict liability has caused one manufacturer, Havir Manufacturing Co., St. Paul, Minn., who produces large industrial presses, to go out of business. American Metal Market/Metalworking News, Aug. 25, 1975, at 16. Florida ameliorated the manufacturer's dilemma by setting a seventeen-year statute of limitations for actions against a seller for causes of action in strict liability, the statute beginning to run when the product is sold, not when the injury is sustained—a solution that is also being considered in Massachusetts. *See* American Metal Market/Metalworking News, Dec. 22, 1975, at 25.

One commentator has suggested that cases involving complex "polycentric" product design issues are beyond the court's limits of adjudication. Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 (1973). Other commentators have suggested that the system could be improved by making the trial process more reflective of the demands of § 402A. Weinstein, Twerski, Piehler & Donaher, *Product Liability: An Interaction of Law and Technology*, 12 DUQ. L. REV. 425 (1974).

that enterprise to a point beyond which it cannot function.

The societal interest in deterring irresponsible behavior is frustrated by the statutory avoidance of responsibility permitted a negligent employer. The law on the one hand creates a duty, but on the other hand finds itself incapable of coercing obedience to the duty. The vast majority of states have safety statutes purporting to regulate employer conduct; the enforcement of these statutes is frustrated due to the statutory bar of the workmen's compensation statutes. While the law appears to create a right on the part of the employee to demand minimal conduct by the employer, it withholds a remedy whereby the right can be vindicated.[85] Neither the safety statutes nor the workmen's compensation statutes result in that deterrence of wrongful conduct which is an essential purpose of any tort liability system.

Judicial dissatisfaction with the unfair allocation of loss between employer and third party has resulted in some ingenious evasions of the exclusive-remedy provision of workmen's compensation. The first invasion of the citadel of employer immunity was the judicial determination that the compensation statutes did not bar suits by a third party founded upon an employer's duty to him extraneous to the employer-employee relationship. If a third party is held liable for an employee's injury, and the employer contributed to the injury by dereliction of a duty with respect to the third party, the employer would be forced to contribute his pro rata share of the total cost, not just the statutory minimum he had paid his employee. This additional duty has usually been founded in a contract between the employer and the third party. In *Stevens v. Polinsky*,[86] for example, a lessor demised premises to an employer whose agreed obligation was to maintain the property. An employee who tripped and injured himself while on that property sued the lessor, who in turn sued the lessee-employer for indemnity. Denying the employer's defense that the workmen's compensation statute barred the employer's sharing the cost of the injury, the court held that the lessee's contractual obligation of maintenance supported the lessor's right to indemnification. The lessee's duty of maintenance was no doubt intended to

85. *Ubi jus, ibi remedium.* "Where there is a right, there is a remedy" is one of the basic postulates of restitution law. A right without a correlative ability to enforce it is worth nothing.

86. 32 Conn. Super. 96, 341 A.2d 25 (1974). *Accord*, Ruvolo v. United States Steel Corp., 133 N.J. Super. 362, 336 A.2d 508 (1975).

benefit the lessor by insuring that the property would be cared for while also shifting the responsibility of making repairs to the one most capable of ascertaining the need for them. A foreseeable consequence of the failure to make repairs was the exposure of the lessor to a lawsuit by persons injured on the property. The employer's interest in being free from suit for an employee's injury yielded to the stronger interest of the lessor in receiving the benefits of his contractual bargain.

A legitimate query regarding the independent-duty doctrine is whether it might allow a manufacturer to sue an employer whose conduct has affirmatively increased the manufacturer's liability exposure to third parties. The identification of a specific duty upon which liability might be based is admittedly difficult, but the duty might be in the nature of one not to do any act which is prohibited by existing law (such as a safety statute).[87] The recognition of an additional tort or contract duty extraneous to workmen's compensation does not involve the delicate policy question regarding judicial invasion of the legislative domain that allowance of suit within the workmen's compensation statute would. Despite the obvious procedural advantages and equitable results that would occur, the existence of a duty in tort on the part of an employer toward a manufacturer has yet to be recognized by any court as a foundation for a manufacturer's indemnity suit.

Rather than address the question of whether a separate duty on the part of an employer should be recognized, some states do attempt to balance the scales between an employer and a third-party tortfeasor by denying to a negligent employer the right to recoup, by subrogation, the compensation amounts paid.[88]

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87. A manufacturer such as that in *Balido* could then sue an employer who had disobeyed a safety statute requiring the installation of safety devices. The manufacturer whose buyer had intentionally disregarded the manufacturer's warnings on product use, to the detriment of an employee-user, could also recover. For example, the failure of an employer to convey to an employee the warnings for use of a dangerous chemical, or to obey the caution stamped on a grinding wheel to use it only with a guard, would be actionable by a manufacturer held liable to a user on strict liability theories.

88. For example, California, North Carolina and South Carolina have proscribed the negligent employer's subrogation rights by allowing the third party to plead the employer's negligence as a defense to the suit for recoupment of the compensation claim. American Cas. Co. v. South Carolina Gas Co., 124 F. Supp. 30 (W.D.S.C. 1954); Witt v. Jackson, 57 Cal. 2d 57, 366 P.2d 641, 17 Cal. Rptr. 369 (1961); Lovette v. Lloyd, 236 N.C. 663, 73 S.E.2d 886 (1953).

B. *The Pennsylvania Rule*

The Pennsylvania Supreme Court, in *Maio v. Fahs*,[89] considered the issue of subrogation in light of the third party's right to contribution among joint tortfeasors. The court balanced the third party's equitable right to share liability with co-tortfeasors under the contribution statute against the employer's statutory obligation to pay only a limited compensation, and concluded that the employer was liable for contribution up to the limit set by the workmen's compensation statute.[90] Under the Pennsylvania rule, the injured employee could recover a statutory amount from his employer, and then sue a third party in tort. If the third party proves that the employer has been negligent, the employer is liable for his pro rata share of the damages, not to exceed the amount for which he would be liable under statute. The third party's liability is thus diminished by the employee's award under the statute. For example, if the loss to the employee is $30,000 and the employer has paid $8,000 in workmen's compensation, the Pennsylvania rule prevents the negligent employer from recovering the $8,000 from the third party tortfeasor. The third party is liable for $22,000, the difference between the total damage award and the amount of the employer's contribution.[91]

The Pennsylvania rule is conditioned upon a broad definition of the term "joint tortfeasor." The traditional bar to contribution by the employer had been the semantic distinction that the employer could not be liable "in tort" when his only liability to an employee was not under tort principles but by statute. The court in *Maio* broadened the definition of "joint tortfeasor" from those with a

89. 339 Pa. 180, 14 A.2d 105 (1940).

90. The court's interpretation was derived from and limited by the Pennsylvania contribution statute, PA. STAT. ANN. tit. 12 §§ 2082-89 (1967), which states that the term "tortfeasors" means two or more persons jointly or severally liable.

In order to clarify the definition of joint tortfeasor when it is sought to be applied to an employer seeking immunity from contribution under the workmen's compensation statute, the California legislature has amended its contribution statute and specifically abrogated the precedents rejected in the landmark decision of Witt v. Jackson, 57 Cal. 2d 57, 366 P.2d 641, 17 Cal. Rptr. 369 (1961). *See* CAL. CODE. CIV. PROC. §§ 875-80 (1955), *as amended* (Supp. 1976).

91. For the mechanics of the Pennsylvania rule, see 2A LARSON, WORKMEN'S COMPENSATION, *supra* note 10, § 76.22 at 14-306. If the liability of the third party is $30,000, technically the third party pays the plaintiff the entire amount and then recovers from him the $8,000 which the negligent employer has paid plaintiff under workmen's compensation. It seems simpler to let the plaintiff keep the employer's $8,000, have the third party pay only $22,000, and enjoin the employer from attempting to collect the $8,000 from the third party.

common liability to include any persons guilty of having contributed to a tort. This original definition of "tortfeasor" was further refined by the Pennsylvania Supreme Court in *Elston v. Industrial Lift Truck Co.*[92] The notion of "joint tortfeasor," the court declared, "does not require . . . a common liability toward the injured party, but only that their combined conduct be the cause of the injury."[93] The employer whose conduct partially causes injury would thus be liable for contribution.

The Pennsylvania rule, denying subrogation to the employer while enforcing contribution on his part to a third party tortfeasor, has been called "the fairest available compromise in light of all the conflicting policy interests."[94] The Pennsylvania rule has been cited[95] for alleviating several of the injustices that failure to permit contribution creates:

> [T]he Pennsylvania rule . . . (1) . . . preserves the economics of the workmen's compensation system; (2) . . . effectuates the policy of contribution . . . (3) . . . harmonizes the compensation law with the law of contribution and (4) . . . protects the non-employer tortfeasor from the possible gross inequity of carrying the whole liability for wrongs caused in perhaps major part by the employer tortfeasor.[96]

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92. 420 Pa. 97, 216 A.2d 318 (1966). The court enumerated the test to be one of combined conduct which causes an injury rather than "joint liability" to the injured party. *Id.* at 102 n.2, 216 A.2d at 320 n.2. The decision culminated the logic of a prior line of cases specifically addressing this issue. *See, e.g.*, Brown v. Dickey, 397 Pa. 454, 155 A.2d 836 (1959); Maio v. Fahs, 339 Pa. 180, 14 A.2d 105 (1940); Stark v. Posh Constr. Co., 192 Pa. Super. 409, 162 A.2d 9 (1960) (interpreting PA. STAT. ANN. tit. 77, § 671 (1952), *as amended* (Supp. 1975)).

93. 420 Pa. at 102 n.2, 216 A.2d at 320 n.2. *Compare* Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130, 145 (1932), wherein it is argued that contribution should be permitted in all cases where there is joint liability for a tort, whether intended or not, concerted or unconcerted, successive or concurrent, active or passive negligence.

94. LARSON, WORKMEN'S COMPENSATION, *supra* note 10, § 1 at 1.

95. The district court in Newport Air Park, Inc. v. United States, 293 F. Supp. 809 (D.R.I. 1968), *rev'd*, 419 F.2d 342 (1st Cir. 1969) sought to adopt the Pennsylvania rule, citing its merits. The circuit court of appeals reversed, on grounds that the court was usurping the function of the Rhode Island legislature by seeking to redefine contribution rights against a negligent employer. The contribution statute had been interpreted previously to bar any recovery from an employer, and the court's adoption of a rule to the contrary was termed "impermissible ad hoc legislation." 419 F.2d at 345.

96. Newport Air Park, Inc. v. United States, 293 F. Supp. 809, 815 (D.R.I. 1968).

"[T]he distortions of our old fashioned fault concepts that have been thought advisable for reasons of social policy are exclusively limited to providing an assured recovery for the injured person; they have never gone on . . . to change the rules on how the ultimate burden was borne." 2A LARSON, WORKMEN'S COMPENSATION, *supra* note 10, § 71.10 at 14-1.

The one shortcoming of the Pennsylvania rule is its seemingly arbitrary limitation of the amount that the third party can recover against the employer under contribution rules. Assume, for example, that an employee's product liability suit against a manufacturer results in an $800,000 verdict[97] in favor of the employee. The employer is sued for contribution on grounds that his neglect equally contributed to the injury. Under the present workmen's compensation statute, an employer pays a totally disabled worker a maximum of two-thirds of the state's "average weekly wage," plus his medical costs. Assuming medical bills of $50,000 and a lost-wages compensation of 2/3 ($187 per week) for 20 years, the workmen's compensation award is $50,000 + $129,523.68 or $179,523.68. The compensation payable by the employer is a mere 22% of the total verdict of $800,000, although his equitable share would have been 50% ($400,000). The manufacturer is liable for $620,477 ($800,000 less the workmen's compensation paid). This represents a sizeable increase over his equitable share of $400,000. In an era when product liability verdicts are taxing many small businesses almost beyond their capacity to exist, the difference between paying the "lion's share" and a "fair share" of the verdict when the employer is equally negligent may be the difference between bankruptcy and solvency.

It has been suggested that the fairest loss distribution system is in fact "a system which leads to an equitable division of the *whole* loss, according to the degree of culpability of the parties."[98] A natural apportionment scheme is that of the comparative negligence statutes, which assess economic liability on the basis of the relative degree of fault appraised to exist on the part of each tortfeasor. A similar apportionment is also commonly made under existing contribution statutes to assess liability among joint tortfeasors. Few states, however, have adopted the Pennsylvania rule, let alone attempted to equalize the scales between negligent employer and third-party tortfeasor via a scheme for distribution of loss based on

97. The sum of $800,000 is no longer a shockingly high figure in the realm of products liability verdicts. *See, e.g.*, Moore v. Jewel Tea Co., 116 Ill. App. 2d 109, 253 N.E.2d 636 (1969), *aff'd*, 46 Ill. 2d 288, 263 N.E.2d 103 (1970) (exploding drain solvent—$930,000). The tort verdict, of course, encompasses pain and suffering, impairment of learning capacity, lost wages and sundry collateral actions as loss of consortium or emotional distress.

98. Riesenfeld, *Workmen's Compensation and Other Social Legislation: The Shadow of Stone Tablets*, 53 CALIF. L. REV. 207, 217 (1965).

comparative culpability.[99] In spite of the monumental rectification of the current inequitable system that a comparative-culpability distribution mechanism could effect, its acceptance seems virtually foreclosed by courts' needlessly restrictive interpretations of workmen's compensation and contribution statutes.[100] Some device

99. There appears to be a double compensation if the employee is allowed to recover medical costs and partial wage loss from both the employer under statute and the third party tortfeasor via lawsuit. Allocation of the "windfall" of double compensation to the employee has raised as much clamor as its allocation to the third party by the subtraction of the amount paid by the employer under workmen's compensation from the amount due from the third party tortfeasor. The third party arguably receives an unfair profit when the payment of the innocent employer's statutory liability reduces his bill to the plaintiff. One statute reduces the third party award by the workmen's compensation amount to prevent double recovery by the employee. *See* CAL. LABOR CODE ANN. § 3601(a)(3) (1971).

In Chamberlain v. Carborundum Co., [1973-1975 Transfer Binder] CCH PROD. LIAB. REP. ¶7014 (3d Cir. 1973), a verdict of $103,100 was entered against the manufacturer of a grinding wheel which had shattered, killing plaintiff's decedent. Carborundum sued as a third party defendant decedent's employer, Berwind Railway Service Co., for negligence in failing to put a guard on the machine. The jury found against the employer on the third party complaint, but the court limited the employer's liability to a sum not to exceed its workmen's compensation liability to decedent. As between manufacturer and employer, the suit for contribution resulted in an obligation by employer to pay its workmen's compensation share, for total fulfillment of its contributions obligation. As to plaintiff, the third party judgment reduced the damage award of $103,100 due from manufacturer by the workmen's compensation amount paid by employer, by allowing employer to set that amount off against its contribution obligation. Plaintiff and employer Berwind both moved to amend the verdict on grounds that there could be no contribution between a strictly-liable manufacturer and a statutorily-liable employer. The circuit court of appeals upheld the trial court's denial of the motion, expressly overruling prior decisions requiring that the parties have *pari delicto* status before contribution was available. The decision had the effect of denying to plaintiff the windfall of double compensation from a recovery of both a workmen's compensation claim and the full amount of the verdict under strict liability theories.

100 The refusal to allow any contribution from a negligent employer has been justified on grounds that it would be statutorily impermissible to resurrect a liability over and above that exclusively imposed by a workmen's compensation statute. A similar argument limits the amount available from the employer, when contribution is permitted to the workmen's compensation ceiling, on the theory that the employer would otherwise be deprived of the benefit of his bargain. As to these arguments, workmen's compensation, in retrospect, is a bad bargain both for the injured worker and the third party joint tortfeasor. *See generally* THE REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS (1972).

The majority of courts rigidly construe contribution statutes, thus denying the employer's liability "in tort" which would support the third party's right to contribution on his part. Contribution is also barred on grounds that a statutorily liable employer and a strictly-liable manufacturer are not parties *in aequali jure* and do not share *pari delicto* status since their liabilities have different sources at law. The requirement of *pari delicto* status is an illogical relic of the early rule that both contributing defendants had to be of equal fault before the court could apportion contribution liability between them. Other interpretations restrict contribution to suits where some "common liability" to a plaintiff on the part of defendants can be identified, rather than "common tortious conduct." Application of the contribution

should be available to balance the competing interests of the employer and the manufacturer with a more equitable result. Uncertainty as to how a just apportionment based on relative degrees of fault might be obtained has led to what one commentator calls "a luxuriant jungle growth of court decisions."[101] Yet one court has successfully resolved "the most evenly-balanced controversy" in a landmark decision, *Dole v. Dow Chemical Co.*,[102] which pays due regard to the stone tablets of both workmen's compensation and contribution statutes while serving the best interests of justice.

IV. Changing the Rule on How the Ultimate Burden Is to be Borne

In *Dole v. Dow Chemical Co.*,[103] an employee of a milling company died as a result of exposure to methyl bromide gas while cleaning a grain storage bin that had just been fumigated. The fumigant had been manufactured by Dow Chemical Company. The decedent's estate sued Dow alleging that a failure to properly label the chemical was the cause of decedent's harm. Dow filed a third-party complaint for indemnification against the employer. The employer moved to dismiss the third party complaint on grounds that it was immune from such suit under the New York workmen's compensation law,[104] which provided that an action could not be brought against an employer for damages sustained by an employee either by the employee himself "or anyone else otherwise entitled to recover damages." The trial court denied the motion, and the employer appealed. The appellate division of the supreme court re-

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statute in several jurisdictions is dependent on a finding of some common right or interest on plaintiff's part against each of those who would be denominated joint tortfeasors. For example, the condition to contribution in Louisiana is a finding that the defendants are "solidarily" liable to plaintiff. "Solidarily" is a term of civil law origin denoting a common right or interest, parallel to the joint and several obligation of the common law. In Washington v. Degelos, 312 So. 2d 918 (La. 1975), an employee sued for injuries caused by a malfunctioning electric tractor-type loader. Suit was filed against the officers of the corporation and the repairer of the loader. The court interpreted the contribution statute to mean that if the omission of the officers and the negligent repair of the machine were concurrent proximate causes of the plaintiff's injury the defendants would be solidarily liable, and contribution would be permitted.

101. 2 Larson, Workmen's Compensation, *supra* note 10, § 59.20 at 10-266.

102. 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

103. *Id.*

104. N.Y. Workmen's Comp. Law § 11 (McKinney 1965).

versed and granted the motion, whereupon Dow appealed. At issue was Dow's right to recover indemnification damages from a negligent employer for breach of a duty which the employer allegedly owed. Building upon existing New York case law and drawing heavily on considerations of social policy, the New York Court of Appeals reinstated the order granting Dow the right to apportionment of liability, based on the relative responsibility of the parties.

Previously, New York had adhered to the active-passive negligence test to determine when indemnification would be permitted[105]—an actively negligent defendant, because his fault was the greater, was deemed unable to recoup his losses from other defendants only passively negligent.[106] The problem with the active-passive test was its conclusion of total victory in the form of indemnification in favor of the passively negligent party against the actively negligent one. Often the fault was not easily divisible into the "all or nothing" proportions required under the active-passive test. Only when the factual disparity between the delinquencies of the defendants was so great that indemnity should follow was the active-passive distinction viable.

The right of a passively negligent party to indemnity against an employer, insulated from common law suit by a workmen's compensation statute, had been established in New York in *Westchester Lighting Co. v. Westchester County Small Estates Corp.*[107] Building upon this case, the court in *Dole* recognized that a decisive difference existed between an employee's cause of action against his em-

105. *See* McFall v. Compagnie Maritime Belge, 304 N.Y. 314, 107 N.E.2d 463 (1952).

106. For example, in Lauro v. All Boro Gas Co., [1967-1970 Transfer Binder] CCH PROD. LIAB. REP. ¶5976 (N.Y. Sup. Ct. 1968), where an injured workman obtained judgment against a seller and a distributor of a propane tank which had exploded when it was dropped due to the absence of a safety cover on the valve, ultimate responsibility was placed on the actively-negligent distributor. The distributor could have installed a safety cover, but the seller had merely placed the original order with the distributor and had never had possession of the tank. The passively-negligent seller was entitled to indemnification from the actively-negligent distributor.

See also Caruloff v. Emerson Radio & Phonograph Corp., 445 F.2d 873 (2d Cir. 1971) (manufacturer's active negligence in failing to warn of the danger of a certain television repair procedure defeated its claim for indemnity); Liberty Mut. Ins. Co. v. American Motors Corp., [1970-1973 Transfer Binder] CCH PROD. LIAB. REP. ¶6452 (N.Y. Sup. Ct. 1970) (insurance carrier denied indemnification from the manufacturer of its insured's auto, because the insured driver was actively negligent in failing to avoid the accident). When both parties are equally negligent, neither cross-claim for indemnity will be allowed. Sylvestri v. Warner & Swasey Co., 398 F.2d 598 (2d Cir. 1968).

107. 278 N.Y. 175, 15 N.E.2d 567 (1938).

ployer and a third party's cause of action against an employer for breach of an independent duty or obligation owed that third party. The plaintiff-employee's suit was in tort against defendant-manufacturer Dow. While the plaintiff-employee would normally have been barred from any recovery in excess of the workmen's compensation amount against his third-party defendant employer, Dow's cause of action against the employer was distinguishable therefrom and, as such, was not extinguished by the exclusive remedy provision of the workmen's compensation statute. Dow's third-party cause of action, which was sustained, resulted in an apportionment of the damages flowing from Dow's obligation to pay the employee under the primary suit.[108]

In a carefully-considered analysis of the social policy reasons mandating such a change, the court surveyed the arguments for a broader view of the apportionment of responsibility among tortfeasors that had been offered in other jurisdictions, focusing upon the following argument:

> The present system runs counter to tort policy goals of deterrence, equitable loss sharing by all the wrongdoers, effective loss distribution over a large segment of society, and rapid compensation of the plaintiff—as well as the judicial economy interest in settling all matters arising out of the same transaction in one proceeding.[109]

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108. The procedural difficulties involved in a complex lawsuit of this nature could be resolved by instructing the jury to consider Dow's complaint for indemnification against third-party defendant employer only if Dow were found liable on the employee's original cause of action. If such a finding were made, the jury could apportion the liability dependent on the proportion of blame found against the third-party defendant. The ultimate resolution of the third-party complaint for indemnification might be a full indemnification, or an apportionment of liability based on relative fault.

The last resort of a third-party employer would be a request for a limitation of his liability only up to the amount for which he would be liable under the workmen's compensation statute (comparable to the Pennsylvania rule). A recognition of the basic difference in the causes of action against the employer by defendant Dow and by the employee commands the corresponding result that no such limitation will be allowed in a verdict based upon Dow's separate cause of action. The court of appeals found arbitrary and unpersuasive the Pennsylvania rule limiting the amount recoverable by a third party to the amount payable by the employer as a workmen's compensation claim, 30 N.Y.2d at 152, 282 N.E.2d at 294, 331 N.Y.S.2d at 390-91, thus reaffirming its disavowal of the doctrine in Westchester Lighting Co. v. Westchester County Small Estates Corp., 278 N.Y. 175, 176, 15 N.E.2d 567, 568 (1938). One commentator, Larson, *Workmen's Compensation: Third Party's Action over Against Employer*, 65 NW. U.L. REV. 351, 364 (1970), has stated that the limitation seems to have had its origin not in judicial capriciousness but in the interest in preserving the ceiling on employer's contribution which was the quid pro quo for expanded employer liability.

109. Comment, *Contribution and Indemnity in California*, 57 CALIF. L. REV. 490, 516

Recognizing the injustice resulting from use of the active-passive test to determine liability, the New York Court of Appeals abandoned that test and concluded that the "[r]ight to apportionment of liability . . . as among parties involved together in causing damage by negligence, should rest on [the] relative responsibility [of the parties] . . . ."[110]

The *Dole* decision thus revolutionized the apportionment of damages among defendants whose actions contribute to bring about a single harm. By characterizing the suit by Dow against the third-party employer as one for indemnification rather than for contribution, the court in *Dole* neatly avoided the necessity of charting a course through the tortuous channels of existing contribution decisions. Rather than assault the threshold issue of whether to allow the employer who cannot be designated a tortfeasor to be sued for apportionment of damages in the nature of contribution, the court recognized a new basis of liability in the independent obligation owed the third party by the employer. This allows a far more predictable and just result than the former reliance upon the initial characterization of the cause of action between the parties as one for indemnity vis à vis one for contribution.

The relative loss apportionment technique of *Dole* could be used with great success to unravel the complex relationships between negligent employers and manufacturers in product liability cases. Should the manufacturer be held responsible for damages to an injured employee, the jury could consider the issue of whether the employer's conduct had been a substantial factor in bringing about harm to the employee. The total verdict for the employee would be paid by both the manufacturer and the employer according to the relative amounts of "fault" assessed against each. The employer would be protected from liability in excess of the workmen's compensation limits only if the jury found his neglect to be inconsequential as compared to the conduct of the manufacturer.[111] The jury, of course, could not consider the question unless the manufacturer had

(1969), *quoted in* Dole v. Dow Chemical Co., 30 N.Y.2d 143, 150, 282 N.E.2d 288, 293, 331 N.Y.S.2d 382, 389 (1972).

110. 30 N.Y.2d at 150, 282 N.E.2d at 295, 331 N.Y.S.2d at 391-92.

111. The most equitable solution may leave both parties wishing the law could have been a little more equitable to their particular side. "Thus was justice ever ridiculed in Rome: such be the double verdict here, which send away both parties to a suit not puffed up, nor cast down . . . . For each a crumb of right, for neither, the entire loaf." R. BROWNING, THE RING AND THE BOOK 747, 752 (1874).

been found strictly liable, for the right of the manufacturer to indemnification from the employer is conditioned upon a breach of the employer's obligation which has resulted in some harm to the manufacturer. Relative fault is of great importance in situations where an employer has disobeyed a safety statute or a manufacturer's warning or has failed to install a safety device. The possibility of being held liable proportionate to one's relative fault has the potential to deter socially irresponsible conduct on the part of an employer unmatched by any of the current loss distribution mechanisms. Indeed, the abysmal failure of both the workmen's compensation statutes and the contribution statutes to discourage an employer's misconduct by means of effective economic sanctions is one of the paramount criticisms leveled at the existing system. Even if the only policy goal effectuated by relative loss apportionment were to be that of deterrence, the adoption of the *Dole* rule would serve justice well.

The *Dole* rule would also remedy the inequitable distribution of losses to a single level of enterprise. Relative loss apportionment ensures that each enterprise within the risk allocation model will absorb only its fair share of the costs of an industrial accident. The situations where the manufacturer is forced out of business because he finds himself unable to distribute the costs of industrial injury quickly enough to the remainder of society should also be substantially diminished.

The *Dole* rule may seem at first glance to be complex in application when the right of an injured employee to compensation from both employer and tort defendant are considered. Assume that in the previously mentioned hypothetical involving a press manufacturer, the manufacturer loses an $800,000 product liability verdict to a plaintiff-employee in a jurisdiction recognizing relative loss apportionment. In a third-party suit for apportionment of the loss, the employer's fault is adjudged to be 50 per cent. The employer's share of the loss as to the manufacturer is $400,000, founded on a cause of action separate from the employer's liability to the employee under workmen's compensation in the amount of $178,000. While the mechanics of transferring the funds may be complex, the interests of all parties are served if the plaintiff is awarded $800,000—comprising $400,000 from the manufacturer's own funds; $178,000 from the workmen's compensation carrier; and $222,000 from the manufacturer received from the employer under loss ap-

portionment. The plaintiff is fully compensated for his loss by receipt of the $800,000. The manufacturer is liable for the entire verdict, but can take solace in the forced "contribution" by the employer which reduces his actual burden to $400,000, one appropriate under the relative loss determination by the jury. The employer pays plaintiff $178,000 under workmen's compensation and transfers to manufacturer $222,000 for distribution to plaintiff. The plaintiff should not be heard to complain that he has lost the additional windfall of $178,000 that is sometimes available under strict indemnity statutes. If the employee's suit against the manufacturer is unsuccessful, the employer cannot be sued for an independent implied-indemnity obligation to the manufacturer because the manufacturer has incurred no loss as a result of any action taken by the employer. The exclusive remedy provision of workmen's compensation limits the employer's loss to the compensation claim.

From the parties' viewpoints, certain inequities remain despite *Dole*'s relative-fault apportionment. If an employer has been negligent but a third party tortfeasor is adjudged blameless, the employer still escapes all but his statutory compensation liability—much as justice might seem to be contravened from the injured employee's view. Moreover, allowing an employer's compensation claim to be set off against the amount payable to the manufacturer for the plaintiff's use is a permutation of the collateral source rule that is certain to raise a cry from savants of restitution law. Further, subtracting the windfall of double compensation from the plaintiff in the interest of simplifying the mechanics of recovery over may appear to allow the wrongdoer to profit from his wrong. But a careful weighing of these disadvantages of a *Dole* apportionment against the overwhelming improvements it is capable of fostering within the loss distribution system shows it to be by far the most equitable of the loss apportionment mechanisms. The *Dole* court is light-years ahead of other courts that insist upon determining loss apportionment by the "shadows of the stone tablets of precedent"[112] or by anachronistic doctrines untempered by any sensitivity to the needs of a dynamic industrial society.

112. "We have come a long way from the time when courts were on guard to keep statutes in their place, in the stone tablets of precedent. For a good many years now legislatures have been erecting some formidable stone tablets of their own . . . ." Traynor, *Comments on Courts and Lawmaking in* LEGAL INSTITUTIONS TODAY AND TOMORROW 48 (Paulsen ed. 1959).

V. A Prognosis: From Tuft to Tuft Across the Morass?[113]

A recognition of the need for change in the current contribution system leads to the question of how the desired improvement might be effected. The primary obstacle to the adoption of relative-fault apportionment is the case law of the jurisdictions, especially that dealing with the construction of the contribution statutes and the workmen's compensation acts. The narrow definition of "tortfeasor" precludes classification of the employer as such a party so as to visit contribution liability upon him under the relevant statutes. The tendency to construe workmen's compensation statutes so as to bar all suits against an employer arising from an injury to an employee covered by workmen's compensation also effectively halts the expansion of the present contribution system to a relative fault system. If the immunity of an employer is considered to go only to his tort liability to his employee, and not to a third party suit sounding in tort, the difficulty is resolved.

One theory for allowing relative-fault apportionment hinges on the denomination of the employer under existing contribution statutes. A determination that the contribution laws and the indemnity laws of a jurisdiction are flexible enough to permit an interchangeable appellation to the suit would permit the entire suit to proceed as an indemnity action. Characterization of the suit as one for indemnity of course evades the purview of the contribution statute in toto.

Another theory for allowing relative-fault apportionment is founded on the recognition of a new right enforceable on behalf of a third party plaintiff against a third party defendant employer. The right can be either that of an implied indemnification by an employer for the benefit of any party who pays a judgment for an injury in which the employer's tortious conduct was a "substantial factor," or an implied indemnification founded on some contractual relationship between the parties. The tort loss indemnification is justifiable on equitable principles and on the same general considerations that first motivated the adoption of the contribution statutes—that each party should pay his fair share of the loss.

Any of the aforementioned theories is legally sufficient to permit

113. "For the resolution of difficult controversies, the case-by-case decision method does no more than carry us from tuft to tuft across the morass." The writer has heard this attributed to Justice Holmes, but has been unable to trace its origin.

a jurisdiction to adopt relative-fault apportionment in contribution cases. The stumbling block is more often that of overcoming the resistance to a change that may radically restructure a key segment of case law. Until courts resolve to attack the problem directly as the *Dole* court did, the morass of contribution-indemnity-exclusive remedy case law will continue to frustrate the dispensation of justice in actions where an employer and a third party both contribute in substantial ways to an employee's injury.

Pennsylvania, of all jurisdictions, is most capable of restructuring its contribution laws to reflect the new equity of relative fault apportionment. The elimination of the stone tablet of *pari delicto* status in *Chamberlain v. Carborundum Co.*[114] allows a negligent employer to be joined with a strictly-liable defendant for purposes of assessing fault under a contribution statute. That Pennsylvania decision has already laid the groundwork for a liberal interpretation of the rule allowing the employer to be denominated a joint tortfeasor for purposes of assessment of contribution, making unnecessary an evasion of the statute by calling the suit one for indemnity. A long line of Pennsylvania cases establishes the right of a third party to sue an employer for contribution, so long as the amount the employer is eventually asked to pay under contribution does not exceed his statutory workmen's compensation liability.[115] This limitation on the amount of contribution is arbitrary and illogical if one accepts the *Dole* hypothesis that in reality the contribution rests upon an independent right of indemnification from the employer to the third party, a right not delimited by the compensation ceiling in the employer-employee nexus. A recognition of this independent indemnification right would render unsupportable the present restrictive Pennsylvania rule of loss apportionment in employer contribution cases. While such a change will find no favor with employers, the

114. [1973-1975 Transfer Binder] CCH PROD. LIAB. REP. ¶7014 (3d Cir. 1973). *See* note 99 *supra*.

115. *E.g.*, the *Chamberlain* court expressly overruled the prior line of cases represented by Fenton v. McCrory Corp., 47 F.R.D. 260 (W.D. Pa. 1969), which held that a tortfeasor liable under negligence theories could not be joined for contribution purposes with one whose liability flowed from § 402A strict liability. The parties were held not to be "in pari delicto," which was a requirement for status as joint tortfeasors under the contribution statute. Defendant was liable for selling a rubber-tipped toy arrow on which the rubber "safety" tip did not prevent the shaft of the arrow from penetrating through to injure plaintiff's eye. The seller sued a playmate as a third party defendant on the theory that the playmate's negligence was a contributing cause of plaintiff's injury for which defendant was liable under § 402A.

fairer treatment which would be accorded all parties under a relative fault apportionment is compelling reason to replace the Pennsylvania rule. An expanded right of contribution against the employer on behalf of the third party manufacturer in the industrial accident cases goes far toward serving justice. And justice, in the words of Daniel Webster, "is the great interest of man on earth."[116]

116. D. WEBSTER, ON MR. JUSTICE STORY (1845), *quoted in* J. BARTLETT, FAMILIAR QUOTATIONS 467 (8th ed. 1882).